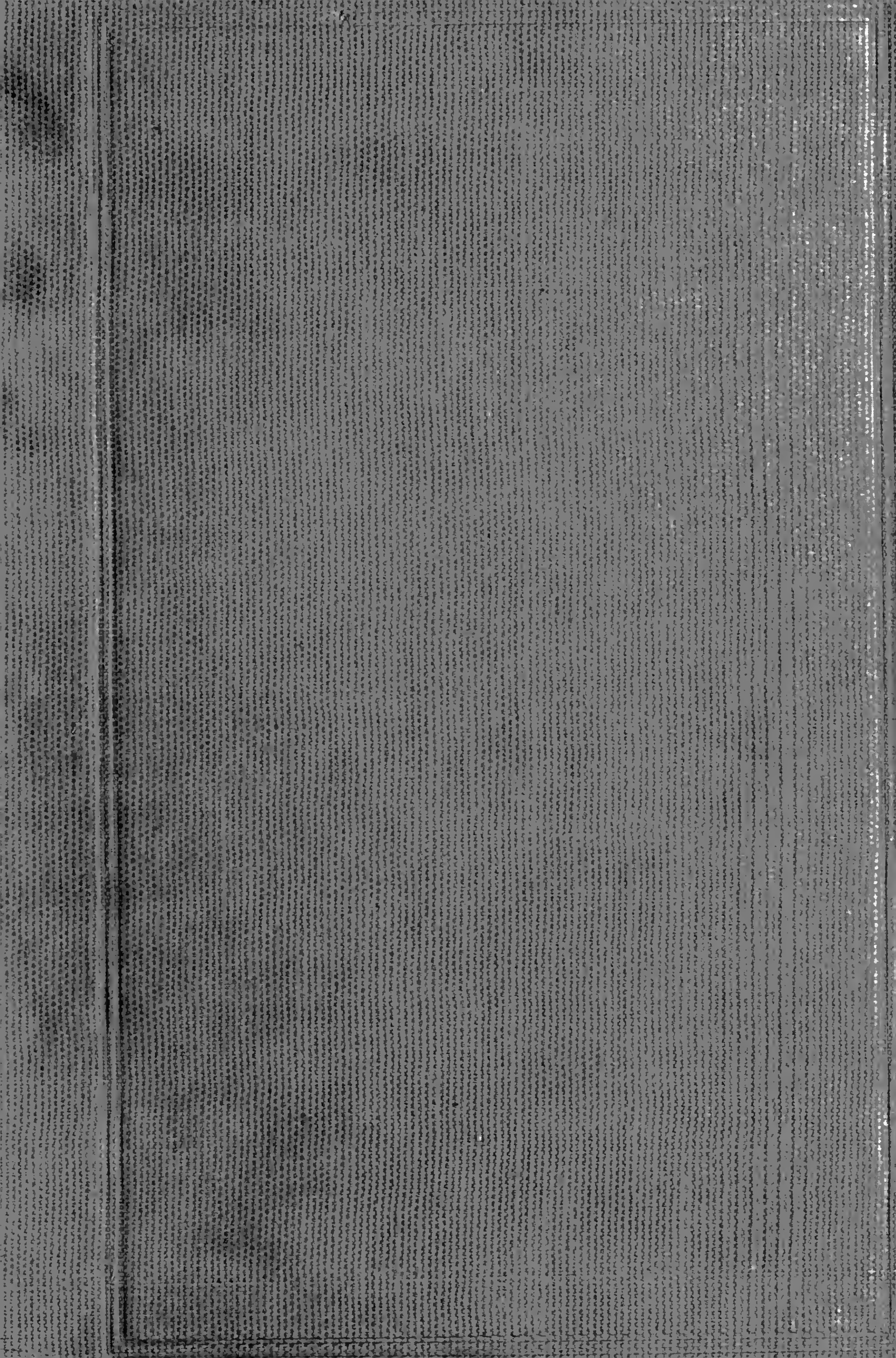

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NO. 7829

United States
Circuit Court of Appeals
For the Ninth Circuit

ANTONIO ROCCHIA,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

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In the Southern Division of the United States District Court, Northern District of California

No. 24941-L

UNITED STATES OF AMERICA

vs.

ANTONIO ROCCHIA

NAMES AND ADDRESSES OF COUNSEL:

Attorneys for Appellant, Antonio Rocchia:

GEORGE J. HATFIELD, Esq.,

FRANK J. PERRY, Esq.,
333 Montgomery St.,
San Francisco, Calif.

Attorneys for Appellee, the United States:

H. H. McPike, Esq.,
United States Attorney,

THOS. G. GOULDEN, Esq.,
Asst. U. S. Attorney,
San Francisco, Calif.

(NO) 24941-L

In the Southern Division of the United States District Court for the Northern District of California.

In the November 1933 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths present:

(R. S. 3258) THAT

FRANK FERRARI, SILVIO CAPPI AND ANTONIO ROCCHIA

(hereinafter called the defendants), on the 9th day of January, 1933 at a place known as 60 Brady Street, in the City and Couny of San Francisco, within said Southern Division, knowingly had in their possession and custody and under their control for the distillation of alcohol a still and distilling apparatus set up, without having registered the same in the manner prescribed by Section 3258 of the Revised Statutes of the United States.

SECOND COUNT: (R. S. 3259)

And the said Grand Jurors, upon their oath, do further present: That on the said day at the said place the said defendants were engaged in the business of a distiller of alcohol, and then and there wilfully failed to give the notice prescribed by Section 3259 of the Revised Statutes.

THIRD COUNT: (R. S. 3260)

And the said Grand Jurors, upon their said oaths, do further present: That on the said day at the

said place, the said defendants having then and there commenced the business of a distiller of alcohol, wilfully failed to give the bond prescribed by Section 3260 of the Revised Statutes of the United States.

FOURTH COUNT: (R. S. 3281)

And the said Grand Jurors, upon their said oaths, do further present: That on the said day at the said place, the [1*] said defendants wilfully engaged in and carried on the busines of a distiller of alcohol, with intent to defraud the United States of the tax on the spirits distilled by them.

FIFTH COUNT (R. S. 3282)

And the said Grand Jurors, upon their said oaths do further present: That on the said day in a building and on premises at the said place the said defendants knowingly made and fermented mash, wort and wash, fit for distillation and for the production of alcohol, other than in a distillery duly authorized according to law.

SIXTH COUNT: (R. S. 3282)

And the said Grand Jurors upon their oaths do further present: That on the said day at the said place the said defendants, not then or there being an authorized distiller, knowingly separated by distillation the alcoholic spirits from fermented mash, wort and wash.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

SEVENTH COUNT: Conspiracy (37 CCUS)

And the said Grand Jurors upon their oaths aforesaid, do further present: That said defendants on or about the first day of August, 1932, the exact time and place being to said Grand Jurors unknown, and at all times thereafter up to and including on or about the first day of February, 1933, did, within the Southern Division of the Northern District of California, wilfully, unlawfully, knowingly and feloniously combine, confederate, conspire and agree together and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to unlawfully have in their possession a still and to operate a distillery in violation of the Internal Revenue laws of the United States, and to manufacture, possess and sell intoxicating liquor in violation of the National Prohibition Act, and that thereafter, during the existence of that conspiracy, and to effect the object there- [2] of, the defendant Antonio Rocchia did the following overt acts at the times and in the manner hereinafter alleged:

(1) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia visited the realty firm of Sam McKee & Company, 2812 Mission Street, in the City and County of San Francisco, State of California, and negotiated for a lease of the premises located at No. 60 Brady Street, in the City and County of San Francisco, State of California;

(2) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia in company with an employee of the realty firm of Sam McKee & Company visited those certain premises located at No. 60 Brady Street, San Francisco, California;

(3) That on or about the 10th day of November, 1932, the defendant Antonio Rocchia executed, under the name of Joseph Rossi, lessor, a lease in writing for the premises at No. 60 Brady Street, City and County of San Francisco, State of California, for the period of one year, with the owner, A. L. Thulin, in the presence of a representative of Sam McKee & Company, and paid the sum of $450; $150 of which being the first month's rent, and the balance being security for last two months rental, under the terms of said lease.

H. H. McPIKE
United States Attorney.

Approved as to form:
R.B.McM.

[Endorsed]: A true bill, Edw. Landis, Foreman

PRESENTED & ORDERED FILED IN OPEN COURT THIS 14th DAY OF NOVEMBER, A. D. 1933.

WALTER B. MALING, Clerk
By Harry L. Fouts,
Deputy Clerk. [3]

[Title of Court and Cause.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday the 9th day of December, in the year of our Lord one thousand nine hundred and thirty-three.

PRESENT: the Honorable HAROLD LOUDERBACK, District Judge.

NO. 24941-L

UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

This case came on regularly for arraignment of defendant, Antonio Rocchia, who was present with his Attorney, Francis J. Perry, Esq., Wm. E. Licking, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Said defendant was duly arraigned and thereupon, by consent, it is ordered that this case be and same is hereby continued to Dec. 23, 1933 at 9:30 A.M. for entry of plea of said defendant. [4]

[Title of Court and Cause.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San

Francisco, on Saturday the 10th day of February, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable A. F. ST. SURE, District Judge, sitting for and on behalf of Honorable HAROLD LOUDERBACK, District Judge.

NO. 24941.

UNITED STATES OF AMERICA
vs.
ANTONIO ROCCHIA

In this case defendant Antonio Rocchia plead "Not Guilty". Ordered case set for trial on March 23, 1934. [5]

[Title of Court and Cause.]

WE, THE JURY, find as to the defendant at the bar, as follows:

Guilty	1st Count
Guilty	2d Count
Guilty	3d Count
Guilty	4th Count
Guilty	5th Count
Guilty	6th Count
Disagree	7th Count

M. E. FIBUSH.
Foreman

[Endorsed]: Filed Jun 27, 1934 at 6 o'clock and 50 Minutes P.M. [6]

[Title of Court and Cause.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 27th day of June, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: the Honorable HAROLD LOUDERBACK, District Judge.

NO. 24941-L

UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

NO. 25112-L

UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

The defendant, Attorneys for both parties, and the Jury heretofore impaneled being present, the trial of this case was resumed. John M. Burt and Wm. P. Goggin, were recalled, Sam McKee, Ray F. Love, Axel L. Thulin, Harold von Husen, Ernest E. Williams, Emil J. Canepa, Geo. W. Poultney, Thomas J. Church and Edward O. Heinrich were sworn and all were examined upon behalf of the United States, and the Government introduced into evidence its exhibits marked No. 9, 10, 11, 12, 13 and 14; and the Government rested. The defendant rested. Francis J. Perry, Esq., Attorney for the

defendant, made a motion for a directed verdict on behalf of the said defendant as to each of the two Indictments herein, which said motions were submitted and ordered denied. After argument by Attorneys for both parties and the instructions of the Court to the Jury, the Jury retired at 3:40 p. m., to deliberate upon their verdict. At 5:40 p. m., the Jury returned into Court for further instructions and again retired at 5:45 p. m. At 6:50 p. m., the Jury returned into Court and upon being asked if they had agreed upon a verdict, answered that it had as to case No. 24941-L [7] which said verdict was presented to the Court and ordered read and recorded, as follows: "We, the Jury, find as to the defendant at the bar as follows: Guilty, 1st Count; Guilty, 2nd Count; Guilty, 3rd Count; Guilty, 4th Count; Guilty, 5th Count; Guilty, 6th Count. Martin E. Fibush, Foreman," Upon being asked, the Jurors further stated they had been unable to agree upon a verdict as to the seventh count of said Indictment, and that they had been unable to agree upon a verdict upon the Indictment No. 25112-L. By consent of both parties, it is ordered that a finding be entered that the Jury had been unable to agree upon said seventh count and the said Indictment numbered 25112-L.

Further ordered, by consent, that Judgment of the defendant Antonio Rocchia be continued to 9:30 a. m., June 30, 1934. Further ordered that the Jurors herein be and they are hereby discharged and excused until 10 a. m, July 2, 1934. Further ordered that the defendant be remanded into the custody of the U. S. Marshal and that a Mittimus issue therefor. [8]

In the Southern Division of the United States District Court for the Northern District of California. First Division.

NO. 24941-L

Conv. Viol. R. S. 3258, 3259, 3260, 3281 and 3282 (Internal Rev. Still Sections)

THE UNITED STATES OF AMERICA,

vs.

ANTONIO ROCCHIA

JUDGMENT ON VERDICT OF GUILTY

Thomas Goulden, Assistant United States Attorney, and the defendant with his counsel came into Court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 14th day of November, 1933, charging him with the crime of violating R. S. 3258, 3259, 3260, 3281 and 3282 (Internal Rev. Still Sections); of his arraignment and plea of Not Guilty; of his trial and the verdict of the Jury on the 30th day of June, 1934, to-wit:

"We, the Jury, find as to the defendant at the bar, as follows:

Guilty 1st Count; Guilty 2d Count; Guilty 3d Count, Guilty 4th Count; Guilty 5th Count; Guilty 6th Count; Disagree 7th Count.

Martin E. Fibush,
Foreman"

The defendant was then asked if he had any legal cause to show why judgment should not be entered

herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for New Trial and a Motion in Arrest of Judgment; thereupon the Court rendered its Judgment; THAT, WHEREAS, the said ANTONIO ROCCHIA having been duly convicted in this Court of the crime of violating R. S. 3258, 3259, 3260, 3281 and 3282 (Internal Rev. Still Sections);

IT IS THEREFORE ORDERED AND ADJUDGED that the said ANTONIO ROCCHIA be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of ONE HUNDRED ($100.00) DOLLARS and a penalty of FIVE HUNDRED ($500.00) DOLLARS as to 1st Count; pay a fine in the sum of ONE HUNDRED (100.00) DOLLARS and a penalty of ONE THOUSAND ($1000.00) DOLLARS as to 2nd Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of FIVE HUNDRED ($500.00) DOLLARS as to 3rd Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of ONE HUNDRED ($100.00) DOLLARS as to 4th Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of [9] FIVE HUNDRED ($500.00) DOLLARS as to 5th Count; be imprisoned for the period of EIGHTEEN (18) MONTHS and pay a fine in the sum of FIVE HUNDRED ($500.00) DOLLARS as to 6th Count. Said place of imprisonment to be in a U. S. Penitentiary to be designated by the Attorney General of the United States.

Further ordered terms of imprisonment to run *concurrnelty.* Further ordered that in default of the payment of said fines said defendant be further imprisoned in the United States Penitentiary until said fines be paid or until he be otherwise discharged in due course of law.

JUDGMENT entered this 30th day of June, A. D. 1934.

WALTER B. MALING, Clerk
By C. W. Calbreath
Deputy Clerk.

[Endorsed]: Entered in Vol 29 Judg. and Decrees at page 351. [10]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the HONORABLE HAROLD LOUDERBACK, Judge of the District Court aforesaid:

Comes now the defendant, Antonio Rocchia, by his attorney and respectfully shows that on the 27th day of June, 1934, the duly impaneled jury in the above-entitled court found a verdict of guilty on six counts of the Indictment herein against the defendant; that on the 30th day of June, 1934, judgment was pronounced and entered in said cause against this defendant wherein and whereby it was adjudged that the defendant Antonio Rocchia, on the first count of said indictment, be confined in a Federal Penitentiary for eighteen months and pay a fine of $100 and a penalty of $500; on the second

count, a fine of $100 and a penalty of $1000; on the third count, a fine of $500 and confinement in the Federal penitentiary for eighteen months; on the fourth count, a fine of $100 and confinement in the Federal penitentiary for the term of eighteen months; on the fifth count a fine of $500 and confinement in the Federal penitentiary for eighteen months; on the sixth count, a fine of $500 and confinement in the Federal penitentiary for eighteen months, the penitentiary sentences to run concurrently so that it will all amount to an imprisonment for eighteen months.

II.

That on said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which are more in detail set forth in the Assignment of Errors which is filed herewith. [11]

III.

This petitioner, said defendant, feeling himself aggrieved by said verdict and judgment entered therein as aforesaid, hereby *peitions* this Honorable Court for an Order allowing him to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided, your petitioner having submitted and filed his bond on appeal as provided by statute and as heretofore fixed by the Court herein.

WHEREFORE, the defendant prays an order allowing an appeal in his behalf to the said United States Circuit Court of Appeals aforesaid, sitting at San Francisco in said Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings and papers in said cause be duly authenticated, and that further proceedings be stayed until the determination of such appeal by the said Circuit Court of Appeals.

GEO. J. HATFIELD
FRANK J. PERRY
Attorney for Defendant.

[Endorsed]: Service and receipt of copy of within hereby admitted this 7th day of July, 1934.

H. H. McPIKE
U. S. Atty.
By R. B. McMILLAN
Asst. U. S. Atty.

[Endorsed]: Filed Jul 9, 1934 3:01 P. M. [12]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

ORDERED, that the PETITION FOR APPEAL by the defendant in the above entitled action, is granted and appeal allowed; cost bond fixed at $250.00; and

IT IS FURTHER ORDERED, that the defendant Antonio Rocchia be admitted to bail pending the hearing of said appeal, in the sum of $10,000.00,

and that execution of the judgment of imprisonment be superseded and stayed, pending the determination of said appeal, upon the giving of said bail.

Dated: San Francisco, the 3rd day of July, 1934.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Jul 9, 1934 3:01 P. M. [13]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

ANTONIO ROCCHIA, defendant in the above entitled cause, in support of his petition for appeal herein, submits the following assignments of error as basis for reversal of judgment and sentence imposed upon him in the above entitled court on the 30th day of June 1934, in the above entitled cause.

A.

The court erred in denying the amended plea in abatement and motion to suppress evidence filed in behalf of defendant, Antonio Rocchia, on February 2, 1934 as a result of an unlawful search in violation of the rights guaranteed to him by the Constitution of the United States, which were made prior to said case being called for trial and which motion was renewed at said trial before the introduction of testimony, and denied thereafter during said trial, and exception taken at the time, said motion being included in the grounds of the mo-

tion by the defendant for a directed verdict of not guilty at the close of the testimony taken at said trial upon the ground that the search of said premises at 60 Brady Street and the subsequent seizure of articles therein [14] and all knowledge derived from said search and seizure was in violation of the rights guaranteed to the defendant by the Constitution of the United States, to the introduction of which testimony objection was timely made and exception taken. Said motion to suppress evidence will more fully appear in and is made part of defendant's bill of exceptions herein.

I.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB testified as follows:

"MR. GOULDEN: Q Then what did you do? A Investigator Goggin opened the door——

"MR. PERRY: Just a moment. I am going to object, your Honor, to any further testimony as to what happened after the agents looked into the building, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution of the United States.

"MR. GOULDEN: This matter of search has all been disposed of and it is too late at this time to make any mention of the legality or illegality of the search.

"MR. PERRY: For the purpose of the record I am renewing my objection.

"THE COURT: Q What did you observe before you went in there? "A We detected the odor of fermenting mash and distillation, which is distinctly different. We heard the sound of the burner in the plant. We could see a *partitition* dividing the building crosswise; in front of this *partitition* was a pile of cartons; there was a pair of large tire tracks which went from the front [15] door and disappeared directly under this pile of cartons.

"Q Did you hear any other sound? A Other than the sound of the motors and burners, no, sir.

"Q You did not hear anything that indicated that anybody was in there? A The sound of the motors and burners in operation.

"Q You didn't see anything that indicated to you that anybody was in there; you heard no rattling of cans, did you? A No, sir.

"Q No people moving about? A No, sir; the other noise was so great that you could not hear anything else.

"Q Was the door open? A It was open about an inch. It was a door that opened in three sections. It was not jammed all the way shut.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception."

II.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB

"WITNESS (Continuing): Inspectors Burt and Goggin entered the premises with me. We went through the first room and took a door to the left. I may say that the partition which went crosswise of the building was——

"MR. PERRY: Just a moment. I am going to object to the testimony as to anything inside the building, as far as the partition goes, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution so far as this defendant is concerned.

"THE COURT: The same ruling.

"MR. PERRY: Exception. [16]

III.

The Court in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB (Continuing)

"I identify this plan that I am now shown as a diagram of the floor plan of the building at 60 Brady Street at the time the distillery was in it. I prepared that diagram, myself. I can mark the door we went through with the figure '1' and then

proceed and enumerate the various doors we went through.

"MR. PERRY: I am going to object to any testimony the witness might give, either with respect to the diagram he has in his hand or to what he did when he went inside the still room, upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception."

"WITNESS (Continuing): This is a correct diagram to the best of my recollection of the premises. It is not to scale but it indicates absolutely the general floor plan. I have marked the doors 1, 2, and 3; 1 being the first door through which we entered, 2 being the second door, and 3 being the third door. The second door is the door that leads into the room immediately to the left of the garage door as we enter. We then proceeded through a door in the back wall there and that permitted us to enter the still room proper. That door that I refer to is marked Door 3. [17]

IV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q What did you find in the still room as shown on the diagram there? (Government's exhibit No. 1 in evidence)

"MR. PERRY: I object to the witness testifying to anything he found in the still room upon the ground that it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

"THE COURT: The same ruling.

"MR. PERRY: Exception.

"WITNESS (Continuing): We found a distillery that was producing between 500 and 1000 gallons of alcohol a day. There were some 30,000 gallons of corn sugar mash, a 500-gallon still, and a 250-gallon still, and over 1000 gallons of alcohol and whiskey. The man who was in charge of the premises at that time we arrested; he gave the name of Ferrari. We entered there about 4:30 o'clock in the afternoon. We arrested him immediately and we questioned him and we searched him."

V.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q What did you find when you searched the defendant Ferrari?

"MR. PERRY: I make the same objection that I just previously made for the purpose of the record, your Honor. Will there be the same ruling? I will make the objection this way, [18] your Honor; I object to any statements to be given by this witness with respect to the last question propounded to him on the ground that it violates the

defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

"THE COURT: Q You arrested the defendant right there? A Yes.

"Q Right in the still house? A Yes; this was Frank Ferrari.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception."

"WITNESS (Continuing) We found on his person a key which fitted the *frong* door to the building. (U. S. Exhibit No. 2 for identification and later as Government's Exhibit No. 4 in evidence)."

VI.

The Court erred in admitting documentary evidence, over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: May I introduce the diagram in evidence, your Honor, as Government's Exhibit next in order?

"MR. PERRY: We object to the document being received in evidence upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth amendments.

"THE COURT: Objection overruled. It will be received as Government's Exhibit 1.

"MR. PERRY: Exception." [19]

VII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

AGENT DE KALB TESTIFIED AS FOLLOWS:

"Investigators Burt and Goggin returned to the still room about six o'clock and at that time they had in their custody another man who when questioned gave the name of Silvio Cappi. This man was searched and questioned. He had in his possession a key which was a duplicate of the key which was in the possession of Ferrari.

"MR. GOULDEN. Q I show you what purports to be a key (taken from the person of the defendant Cappi and marked U. S. Exhibit No. 3 for identification and later as No. 5 in evidence) and ask you if you have ever seen it before.

"MR. PERRY: I object to any testimony in respect to it upon the grounds heretofore urged, it violates the Fourth and Fifth Amendments to the Constitution so far as the constitutional rights of the defendant Rocchia are concerned.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception.

"WITNESS (Continuing); This key I can come more nearly saying it is the same key, because at the time the key was in my possession I noticed the fact that it was a duplicate, it had been made

by S. Orioli; however, I cannot say absolutely that that is exactly the same key taken off his person."

VIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear [20] as follows:

AGENT DE KALB (Continuing) "At about ten o'clock in the evening Inspector Goggin and myself returned to the still building. At that time Investigator Burt was in the still room and had in his custody this defendant, Antonio Rocchia. At that time Investigator Goggin and Investigator Burt, the defendant Antonio Rocchia and myself were the only ones present in the building.

"MR. GOULDEN: Q What transpired next? "A Investigator Goggin made the remark——

"MR. PERRY: Just a moment. I am going to object to anything that may have transpired at this time upon the ground that it violates the constitutional rights of the defendant Antonio Rocchia, particularly as respects the Fourth and Fifth Amendments to the Constitution.

"THE COURT: Q This was in the presence of the defendant on trial? A Yes.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception."

IX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"WITNESS (Continuing) Investigator Goggin and I, as I recall it, stated to Investigator Burt, 'It looks like you have got the big shot.' Investigator Burt said, 'I have,' or something to that effect. Investigator Burt said, 'Search him and see what you find.' The defendant Rocchia did not make any comments at this time, he stood mute. [21]

"MR. GOULDEN: Q What did you do?

"MR. PERRY: I object to anything this witness may have done in that respect, on the ground that it violates the constitutional rights of the defendant on trial, particularly with respect to the Fourth and Fifth Amendments.

"THE COURT: Q He was under arrest at the time, was he not? A Yes.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception.

"WITNESS (Continuing) I searched the defendant and *fund* in his inside coat pocket a long wallet in which there was a quantity of money. I counted this money and there was $1600, in currency. I counted this money on the floor. Inspector Goggin found in the defendant's pocket another key which matched the two keys he had already taken from the other two defendants. In-

vestigator Goggin found that key in the coat pocket of Rocchia. We compared the three keys. I satisfied myself that that key was a key similar to those that have been presented here for identification as Government's Exhibits 2 and 3, the other two keys.''

X.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: [22]

''In the presence of the defendant Investigator Goggin asked Investigator Burt if the defendant had not offered him the money for the purpose of securing his liberty, and Investigator Burt stated that he had, and humorously stated that it was a very tempting offer. The defendant did not say anything at that time.

''MR. PERRY: If your Honor please, I wish to make an objection to that particular item of testimony just given upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

''THE COURT: Objection overruled.

''MR. PERRY: Exception.''

XI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

''MR. GOULDEN: Q Was anything further found on the person of Rocchia?

"MR. PERRY: The same objection to that, your Honor.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception.

"A Investigator Burt displayed some papers which he had already taken from the defendant and stated that he found them on the defendant's person."

XII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q Did you see these papers? A Yes.

"Q Did you examine them? A Yes.

"Q In a general way, what were these papers? [23]

"MR. PERRY: I object to any testimony by this witness, testifying in a general way, or in any way, with respect to the papers, upon the ground, first, that the original papers, themselves, are the best evidence; upon the second ground that it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution; upon the third ground——

"THE COURT: What is the situation regarding these papers?

"MR. PERRY: Upon the third ground that an order of the Court has already been made directing

the return of the papers to the defendant. I wish at the same time, as part of the objection, to offer in evidence the record before the United States Commissioner, his docket No. 3142, and particularly the documents—the complaint filed before the Commissioner, the order of Judge Kerrigan directing the return of certain documents, and the bond of the defendant on trial.

"MR. GOULDEN: I don't see the relevancy of this offer. There is nothing here that has any connection with this case. There is nothing to show any ruling was made on the so-called petition for exclusion. On that ground I object to it as entirely immaterial, irrelevant, and incompetent.

"MR. PERRY: In that particular respect I wish to say that the matter was presented to the United States Commissioner, a motion to suppress was filed before the United States Commissioner, and the case was dismissed as to the defendant Rocchia on trial here.

"THE COURT: Where is the petition upon which this is predicated?

"MR. PERRY: There is a petition for the exclusion of evidence and the notice of motion.

"THE COURT: I want the petition in No. 3142.

"MR. PERRY: This is it, your Honor. I will make it part of [24] the same record. So there will be no confusion in the record, your Honor, I wish to say that the case that was pending before

the United States Commissioner was dismissed as to the defendant Rocchia.

"THE COURT: Let me ask counsel for the Government, are you intending to put in evidence any property which was returned by this Court to the defendant?

"MR. GOULDEN: I intend to put in evidence, your Honor, exact photographs of these documents. The documents are in the possession of the defendant by an order of the Court. Under the well-known rules of evidence, where the evidence is in the particular and the peculiar custody of the other side, secondary evidence is permissible.

"THE COURT: That is not my point. Is this property which was covered by the order of Judge Kerrigan requiring its return to this defendant, are you contemplating offering that? Are you going to make any collateral attack on that order?

"MR. GOULDEN: I don't know whether that order is subject to collateral attack at the present time, or not. It reads that a motion to suppress has been granted. Undoubtedly that was the reason for the court signing the order. The fact is that no motion to suppress had been granted. I have the word of the Commissioner, himself, on that, and he has filed an affidavit.

"MR. PERRY: Counsel is giving testimony now, your Honor. The question your Honor asked counsel was whether or not any of the documents that were ordered returned by Judge Kerrigan were to be used on this trial. I understood that was the question your Honor asked counsel.

THE COURT: Of course, I think that the whole situation comes down to this, that the Court is to pass upon the legality of the arrest of this defendant, and that has not been presented [25] to the Court as yet.

"MR. GOULDEN: That has been presented to your Honor so far as the search and seizure were concerned. *Thaa* has been presented to and passed upon by your Honor.

"THE COURT: I do not at this time recall the facts.

"MR. GOULDEN: It was submitted to your Honor both on oral arguments and on briefs.

"THE COURT: I think you should produce the circumstances of his arrest here, just how it occurred. I do not recall those circumstances. This order is predicated on the supposed action of the Commissioner.

"MR. GOULDEN: Yes. The Commissioner has filed an affidavit telling exactly what happened. He will testify, if required.

"THE COURT: You expect to produce that testimony before the trial is over?

"MR. GOULDEN: Yes. I could not anticipate whether it was going to be necessary, or not.

"THE COURT: Under that assurance I will at this time overrule the objection of counsel.

"MR. PERRY: So that there is not any confusion, if your Honor please, I make an offer of these documents in evidence. For the purpose of

the record, and protecting the record, I would like to have them received in evidence.

"THE COURT: I will receive them for identification.

"MR. PERRY: Your Honor, do I understand by that that they are not to be received in evidence? I am making the offer in evidence and not for identification.

"THE COURT: They will be received for identification only.

"MR. PERRY: Note an exception."

(Documents marked as Defendant's Exhibit 1 for identification) [26]

XIII.

The Court erred to the substantial prejudice of the defendant in denying defendant's motion for instruction to the jury to disregard prejudicial misconduct on the part of the Assistant United States Attorney, as will more fully appear as follows:

AGENT DE KALB testified:

"MR. GOULDEN: Q What did you find on the defendant when you made a search of the defendant?

"MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United

States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

"MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

"MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

"THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation where you are proposing [27] to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this

defendant was properly arrested so as to warrant the reception of this evidence.

"MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

"MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

"MR. PERRY: I object to that as an improper remark by counsel.

"THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

"MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

"THE COURT: The Court refuses to receive the instruction.

"MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling [28] upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

"THE COURT: The objection will be overruled.

"MR. PERRY: And, furthermore, with all due respect to Your Honor, I take an exception to your Honor's remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

"THE COURT. I don't recall any such statement on the part of the court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

"MR. PERRY: I ask your Honor to instruct—

"THE COURT: You will find that I didn't suggest any subpoena or any other action.

"MR. PERRY: You stated he could call on the defendant to produce certain documents.

"THE COURT: The objection will be overruled.

"MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself."

XIIIa.

The United States Attorney was guilty of misconduct, which misconduct was substantially prejudicial to the rights of said defendant and prevented him from having a fair and impartial trial, as will more fully appear as follows:

AGENT DE KALB testified:

"MR. GOULDEN: Q What did you find on the defendant when [29] you made a search of the defendant?

"MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the *Fourt* and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

"MR. GOULDEN: There is no question the documents were returned. The government does not make any contention that they were not returned. There is nothing in the order that says

they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

"MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

"THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain *hearins.* I don't know whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by [30] subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

"MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

"MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

"MR. PERRY: I object to that as an improper remark by counsel.

"THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any

documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

"MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

"THE COURT: The Court refuses to receive the instruction.

"MR. PERRY: I am sorry I said that word, your Honor, I [31] didn't intend to. I object *t* counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

"THE COURT: The objection will be overruled.

"MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remarks. Your Honor stated that the Government had the right to call on the defendant

by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

"THE COURT: I don't recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

"MR. PERRY: I ask your Honor to instruct—

"THE COURT: You will find that I didn't suggest any subpoena or any other action.

"MR. PERRY: You stated he could call on the defendant to produce certain documents.

THE COURT: The objection will be overruled.

"MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself."

XIIIb.

The Court was guilty of misconduct, which misconduct was substantially prejudicial to the rights of said defendant and prevented him from having a fair and impartial trial, as will more fully appear as follows:

AGENT DE KALB testified: [32]

"MR. GOULDEN: Q What did you find on the defendant when you made a search of the defendant?

"MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give

in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

"MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

"MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

"THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation where you are proposing [33] to offer something that should

not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of his evidence.

"MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

"MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

"MR. PERRY: I object to that as an improper remark by counsel.

"THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

"MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Govern-

ment as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

"THE COURT: The Court refuses to receive the instruction. [34]

"MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

"THE COURT: The objection will be overruled.

"MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

"THE COURT: I don't recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

"MR. PERRY: I ask your Honor to instruct——

"THE COURT: You will find that I didn't suggest any subpoena or any other action.

"MR. PERRY: You stated he could call on the defendant to produce certain documents.

"THE COURT: The objection will be overruled.

"MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself."

XIIIc

The court erred to the substantial prejudice of the defendant in denying the defendant's motion for instruction to the jury to disregard prejudicial misconduct on the part of the court, as will more fully appear as follows: [35]

AGENT DE KALB testified:

"MR. GOULDEN: Q What did you find on the defendant when you made a search of the defendant?

"MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those docu-

ments which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

"MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

"MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

"THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know [36] whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

"MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

"MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

"MR. PERRY: I object to that as an improper remark by counsel.

"THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

"MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself, I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

"THE COURT: The Court refuses to receive the instruction.

"MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling [37] upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to in-

struct the jury to disregard the remarks of the United States Attorney.

"THE COURT: The objection will be overruled.

"MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

"THE COURT. I don't recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

"MR. PERRY: I ask your Honor to instruct——

"THE COURT: You will find that I didn't suggest any subpoena or any other action.

"MR. PERRY: You stated he could call on the defendant to produce certain documents.

"THE COURT: The objection will be overruled.

"MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself."

XIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"WITNESS (Continuing) Investigator Burt displayed certain papers which he stated at that time he had taken from the person of the defendant Rocchia——

"MR. GOULDEN: Q Can you tell the Court and jury what these papers were? [38]

"MR. PERRY: I am going to object to that on the ground that the papers, themselves, are the best evidence.

"THE COURT: You can state what they appear to be. I don't suppose you can characterize it as any particular legal document, unless it was a legal document, unless it was read.

"MR. PERRY: I object to it further on the ground that any testimony he might give in this particular respect violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments; and on the ground based upon the previous offer with respect to the records before the United States Commissioner which were received for identification, and marked Defendant's Exhibit No. 1.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"WITNESS (continuing): There was a list which was written partly in Italian and partly in English. The items ran 'Zucchero,' and then an item, something like $250. Yeast $55. There was an item Carabinieri $300. There was an item Canne, the amount I don't remember. These were all on one list. The items Zucchero and Yeast were repeated a number of times. There was an item about

a carpenter $25. There was an item indicating the name Fran and an amount of money after it. There were several other items which I do not recall at this time. There was a receipt on a foreign money order showing the name Rocchia. There was a driver's license showing the name of Antonio Rocchia. There was a couple of money orders or deposit slips in the American Trust Company Bank, I believe, showing amounts of money deposited in the name of Rocchia. There was on the bottom of a sales ticket the name of Deneri and a telephone number. There were certain cancelled checks. At this time I do not recall any other items but there were other papers, but I can't remember just what they were. One was a sales slip indicating an amount of sugar that had been sold.

"MR. GOULDEN: Q I show you a group of photographs of papers and ask you if you know what they are. [39]

"MR. PERRY: In order to lay the proper foundation, your Honor, I am going to object again to any testimony with respect to documents that he now has in his hands upon the ground that the originals are the best evidence; that there was a hearing before the United States Commissioner involving this same offense; that a motion to suppress was filed at the hearing and that the case was dismissed by the United States Commissioner, and that an order was made by Judge Kerrigan directing the return of certain papers. The record to which I just referred with respect to the hearing

before the Commissioner is Defendant's Exhibit 1 for identification. I object to it upon the ground that by virtue of the order issued by Judge Kerrigan it violates the defendant's constitutional rights when he is called upon to give testimony and evidence against himself. I make *ny* objection on that ground, your Honor.

"MR. GOULDEN: There is no question about the documents having been returned. I don't know it personally, I was not in the office at that time, but I understand they were. I know there is an order. The order makes no mention of the fact that these exhibits were passed upon by the Court, or that the Court had ever seen them. It is a consent order signed by the counsel, agreed to by the Government's counsel that they must be returned. It inadvertently states that a motion to suppress was granted by the Commissioner. Whether it was or was not is not binding on this Court. We will produce the Commissioner on the witness stand.

"THE COURT: Any documents, if there were such documents, cannot be gotten at this time.

"MR. GOULDEN: The Government has made no demand, your Honor.

"THE COURT: I think the only thing that can be done is to have the witness testify whether this appears to be a copy of the true document taken from the defendant at that time.

"A All with the exception of these three checks which do not represent anything that were on the person of the defendant [40] were shown to me by Investigator Burt.

"MR. PERRY: Your Honor, may we have a ruling on my objection?

"THE COURT: You mean the objection made last?

"MR. PERRY: Yes, your Honor.

"THE COURT: The objection will be overruled. Of course, you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself. There is no doubt but that these photographs can be taken into consideration if they are true photographs of the documents that were upon the person of the defendant at the time which has been testified to.

"MR. PERRY: Exception.

"WITNESS (Continuing) These photographs appear to be exact replicas of the originals taken from the person of Mr. Rocchia; they resemble the photographs; I believe they are true photographs of the originals."

(The photographs were here marked U. S. Exhibits 5 and 6 for identification.)

XV.

The Court erred in admitting documentary evidence over the objection of the defendant as will more fully appear as follows:

DE KALB testified relative to three photos of still as follows:

"These three small prints are prints of the picture that I took; these two were taken that night and this one was taken the following morning about

daylight. Investigators Goggin and Burt are *swhon* in this picture. They depict the condition as it existed on the night I entered the building, with the excep- [41] tion of the position of certain hoses, I think certain hoses were turned around, and one shows a light that I put down on the floor in order to take the picture. With respect to the vats and the cans of alcohol and the sacks of sugar it is just the same.

"MR. GOULDEN: I ask that these three photographs be offered in evidence as Government's Exhibit next in order.

"MR. PERRY: I object to these photographs being offered in evidence on the ground that they violate the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments to the Constitution, by what they portray. They portray what has not been testified by way of evidence.

"THE COURT: The objection is overruled; they will be received as Government's Exhibit 2 in evidence. They are received for the purpose of illustration.

"MR. PERRY: Exception."

XVI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

GOGGINS testified:

"I went to the large garage door at 60 Brady Street, the door was about two or three inches ajar,

it was not tightly closed, I opened the door and entered with Investigator De Kalb and Investigator Burt, then turned to the left as I entered and there was a door to the left which was unlocked and which I opened and I entered the next room. Investigator De Kalb opened another door and we entered the still premises and placed Ferrari under arrest. [42]

"MR. GOULDEN: Q What did you find in the still room proper?

"MR. PERRY: I object to anything the witness might have found in the still room proper upon the ground that it violates the Constitutional rights of the defendant on trial under the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A. I found two stills in operation; I found four 5000-gallon vats full of mash; I found one 5000-gallon vat about half full. I found about 1000 gallons of alcohol."

VII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, as will more fully appear as follows:

AGENT GOGGINS—witness:

"MR. GOULDEN: Q Does Government's Exhibit No. 1 in evidence correctly describe the floor plan of the still room so far as the partitions and the lay-out of the still property, the vats and the stills, themselves, are concerned?

"A. Yes.

"MR. PERRY: Just a moment. I object to the question on the ground it violates the constitutional rights of the *derendant,* particularly with respect to the Fourth and Fifth Amendments.

"THE COURT: The objection is overruled.

"MR. PERRY: Exception."

XVIII.

The court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear [43] as follows:

"MR. GOULDEN: Q Was anything taken from the person of Ferrari?

"MR. PERRY: I object to the question on the ground that it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A A key."

XIX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q Did you search this man Cappi?

"A He was searched in my presence.

"Q Was anything found on his person? A A key.

"MR. PERRY: I object to that on the ground that it is a violation of the rights of the defendant

under the Fourth and Fifth Amendments to the Constitution, so far as the defendant Rocchia is concerned.

"THE COURT: The objection is overruled.

"MR. PERRY: Exception.

"A There was a key found on his person." (Government's Exhibit 3 for identification and #5 in evidence) [44]

XX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent GOGGIN testified:

"We left the still premises between 6:30 and 7 o'clock. Investigator Burt was left in charge. We returned about ten o'clock that evening and Investigator Burt was on the premises when we returned.

"MR. GOULDEN: Q Who was with him, if you know?

"MR. PERRY: We object to that on the ground that it violates the rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A. The defendant Tony Rocchia, who gave his name at that time as John Caruso, was on the premises with Inspector Burt."

XXI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

MR. GOGGIN (Continuing) "I had a conversation with Investigator Burt at that time.

"MR. GOULDEN: Q What was that conversation?

"MR. PERRY: I object to anything said by this defendant, or by the agents in the presence of the defendant, upon the ground that it violates the constitutional rights of this defendant, particularly with respect to the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception. [45]

"A I said 'It appears that you have the big shot.' Investigator Burt answered saying, 'Search him and see for yourself.' "

XXII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: Q Did you search the defendant Rocchia?

"MR. PERRY: I am going to assign the remarks of this witness in saying that Rocchia was the big shot as improper on the part of the witness and ask your Honor to instruct the jury to disregard it.

"THE COURT: Q At that time nothing was said by the defendant, at all, was there? A No, your Honor.

"Q He stood mute? A Yes, your Honor.

"THE COURT: The objection will be overruled.

"MR. PERRY: If your Honor please, this witness for the first time came into the room and he said, according to his testimony, 'It looks like he is the big shot.' He never saw the man before. My objection is that any such remark upon the part of the witness is misconduct in making such a statement, and I assign it as such and I ask that the remarks be withdrawn and that the jury be instructed to disregard them.

"MR. GOULDEN: The witness was asked what statement he made, or some question to that effect. If that is the statement that was made that is the only answer he can give.

"MR. PERRY: This witness could have said anything he pleased when he stepped into that room. It is what the defendant might have said that counts. It is not what this witness could possibly say.

"THE COURT: It is a question whether a man has a question directed to him or when things are said that apply to him, it is [46] of moment to know how a man acts or what he says in response thereto. In this case these statements were made in his presence and he did not elect to reply. I will allow it to remain in the record.

"MR. PERRY: Exception."

XXIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, as will more fully appear as follows:

"MR. GOULDEN: Q What did you find as a result of the search of the person of Rocchia?

"MR. PERRY: I object to that also as calling for the opinion and conclusion of the witness, and it violates the Fourth and Fifth Amendments to the Constitution as to the defendant Rocchia.

"MR. GOULDEN: The only thing that question can possibly bring out is what the man found, and not any conclusions of his.

"THE COURT: I will allow the question.

"MR. PERRY: Exception.

"A I found a key in his pocket."

XXIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: AGENT GOGGIN (Continuing) "Investigator DeKalb searched the defendant in my presence.

"MR. GOULDEN: Q What did the search of Investigator DeKalb reveal in your presence, what did he find?

"MR. PERRY: I object to that on the ground that it violates the Fourth and Fifth Amendments to the Constitution of the United States in so far as the defendant Rocchia is concerned.

"THE COURT: Q Did you see him take anything off the person of the defendant? A Yes, I did.

"MR. GOULDEN:

"Q Counsel can object to this question if he wishes to. What did he find? [47]

"MR. PERRY: I object to that on the ground that it violates the rights of the defendant under the Fourth and Fifth Amendments to the Constitution upon the ground that in the matter pending before the United States Commissioner, as evidenced by Defendant's Exhibit No. 1 for identification, there was a motion made, a petition filed to exclude evidence, and as a result of the hearing an order was made for the return of the personal property together with the bond in that particular matter. Any testimony that this witness might give in response to the question propounded to him would be with respect to documents that were ordered returned in accordance with the order of Judge Kerrigan as set forth in Defendant's Exhibit 1 for identification. I object to it upon the ground that any documents that he might refer to the originals are the best evidence.

"THE COURT: We have not reached a lot of those points that you are making. The objection is overruled.

"MR. PERRY: Exception.

"A He took a wallet from his person. Investigator De Kalb took from the defendant's person, from his inside coat pocket, a wallet which contained $1600 in currency."

XXV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"Q Was any conversation had at that time in regard to money?

"A Yes, there was.

"Q What was that conversation?

"MR. PERRY: I object upon the ground that it violates the rights of the defendant under the Fourth and Fifth Amendments to the Constitution.

"THE COURT: Overruled.

"MR. PERRY: Exception.

"A I asked Investigator Burt if the defendant offered him the money and he said he did; the defendant did not deny it." [48]

XXVI.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"Agent Goggins (continuing): We took him (Rocchia) to our office and finger printed him. Government's Exhibit #7 for identification is one of the cards. We took three.

"Q. Whose finger prints are they?

"MR. PERRY: That is objected to as being immaterial, irrelevant and incompetent. The United States Attorney stated that he wanted to use the writing or the signature on there as an exemplar. Whose finger prints they are does not make any material difference.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A I saw the finger print made and I saw the fingers of the defendant here on trial placed on the card so as to make these imprints. I saw the card signed; it was signed by the defendant Rocchia in my presence. The signature that he placed on there was John Caruso. The card was marked U. S. No. 3 in evidence."

XXVII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Goggins.

"Q Did Investigator Burt make any statements, after you and Mr. De Kalb had searched the defendant Rocchia? A He did. Investigator Burt had papers which he stated he seized or found on the defendant's person." [49]

"Q I show you Government's Exhibits 5 and 6 for identification, (later received as Government's Exhibits Nos. 7 and 8 in evidence) No. 5 being three photographs and No. 6 being seven photographs, and I will ask you if they appear to be photographs of the documents you saw in Investigator Burt's possession which he claimed to have taken from the person of the defendant Rocchia on the evening of January 9, 1933, in the still building?

"MR. PERRY: I am going to interpose an objection, your Honor, that the question violates the rights of the defendant, and particularly as respects

the Fourth and Fifth Amendments to the Constitution; that he is testifying from photostats, the originals being the best evidence. Upon the further ground that there was a hearing before Commissioner Williams and a complaint filed and a petition for the exclusion of evidence and the return of property was filed, and an order for the return of the personal property which was taken from the possession of the defendant Rocchia was ordered by Judge Kerrigan in this District Court, and that any testimony that this witness might give with respect to those particular documents violates that order and also the Fourth and Fifth Amendments to the Constitution.

"THE COURT: Q You could not very well *described* those documents, could you—I *eman* fully, as they were?

"A Not very well, your Honor.

"Q In viewing these photographs, do they truly depict the documents as you remember them? A. Yes, your Honor, I remember this one.

"Q Look at them all and see if they truly depict the documents which you saw and which the agent stated he removed from the person of the defendant at that time. A Yes, your Honor.

"THE COURT: The objection will be overruled. [50]

"MR. PERRY: Exception.

XXVIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt testified as follows:

"We entered the fore part of the building, and proceeded toward the rear until we got to a door which was on our left hand in another partition which ran from the front toward the back and divided the fore part of the still building into two rooms. The door was ajar. Investigator Goggin pushed it open and we went through and into the other room on the other side of the fore part of the still building, Investigator De Kalb then opened another small door which was closed but not locked, and through which we could see light through the keyhole and also around the cracks of the door. The three of us entered the rear part of the still building, and there was a large alcohol *distrillery* in operation, and we——

"MR. PERRY: Just a moment, please. I object to any further testimony of this witness as to what he found, or saw, or heard within the premises upon the ground that it violates *and* constitutional rights of the defendant Rocchia, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception."

XXIX.

The Court erred in admitting documentary evidence over the objection of the defendant, as will more fully appear as follows: [51]

Agent Burt testified as follows:

"On January 30th of that year I marked Ferrari's initial on the key. The marking is right here, the letter "F," scratched in the metal. I had kept the keys separately until that time.

"MR. GOULDEN: I ask, your Honor, that this key be placed in evidence as Government's Exhibit next in order.

"MR. PERRY: I object to it on the ground that it violates the constitutional rights of the defendant Rocchia, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: The objection is overruled. It will be received as Government's Exhibit 4 in evidence.

"MR. PERRY: Exception."

XXX.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt testified:

"Investigators Goggin and De Kalb left with Ferrari and Cappi to take them to the prison and book them, leaving me in the custody of the premises.

"MR. GOULDEN: Q What happened at 8:10 p. m.?

"MR. PERRY: I object to any testimony that this witness might give as to what happened at 8:10 p. m. on the ground that it will violate the constitutional rights of the defendant Bocchia, particularly as respects Amendments Four and Five to the Constitution.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A I had started for what was Door No. 5, intending to go up and look over the mezzanine floor more carefully, and I heard footsteps out in front of the premises, and saw a sort of a shadow of a man's head and shoulders passing in front. I stopped in the middle of the room. The foot steps ceased in front of [52] the small door, I then heard again the rattle of a key in the lock and I stepped under the stairs which led up to the mezzanine floor and concealed myself. I heard the small door open and close and then Door No. 5 was opened—it was not locked at that time; it was opened and I heard a man step down into this larger room. I stepped out from under the stairs and threw the beam of my flashlight in his face and told him that I was a federal officer and that he was under arrest."

XXXI.

The Court erred in admitting documentary evidence over the objection of the defendant, as will more fully appear as follows:

Agent Burt (continuing)

"Q Did you have any conversation with the defendant Rocchia when you went into the hill room? A Yes, sir.

"Q What was that conversation?

"MR. PERRY: I object to any conversation on the ground that it would be in violation of the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A He turned to me and said, 'Are you really a federal officer?' I said, 'I am,' and I showed him my badge. He said, 'Suppose I give you $500 and you let me walk out and nobody will ever know the difference.' "

XXXII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: [53]

Agent Burt (Continuing)

"Q Is there anything about that key (U. S. Exhibit No. 4 for identification) that makes you certain that that is the key that Rocchia had? A The initial 'R' scratched in the metal.

"Q Who placed that there? A I did.

"MR. GOULDEN: I ask, your Honor, that Government's Exhibit 4 for identification be now received in evidence.

"THE COURT: It will be received and marked Government's Exhibit 6 in evidence.

"MR. PERRY: I object to it on the ground that it violates the constitutional rights of the defendant, particularly as respects Amendments Four and Five.

"THE COURT: Objection overruled.

"MR. PERRY: Exception."

XXXIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

"MR. GOULDEN: Q Would you recognize the papers that were seized from the defendant if you saw them again? A I would.

"Q I show you three documents marked Government's Exhibit 5 for identification, purporting to be photographs of certain papers; also seven photographs marked Government's Exhibit 6 for identification, and ask you if you ever saw them before, or the originals from which they might be taken?

"MR. PERRY: I object to the question upon the ground that it violates the defendant's constitutional rights under the Fourth and Fifth Amendments; that a complaint was filed before the United States Commissioner in this District charging

the [54] defendant Rocchia with violating the National Prohibition Act, and that that was on January 10, 1933, and that it was signed by William Goggins; that a petition for the exclusion of evidence and return of property was filed and an order of court was made directing the return of the personal property. I object to this on the ground that the originals are the best evidence.

"MR. GOULDEN: There is no question about that, your Honor.

"THE COURT: You are offering them as next in order, are you?

"MR. GOULDEN: No, I am asking the witness if he can identify these.

"THE COURT: Objection overruled.

"MR. PERRY: Exception."

XXXIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

"Q In other words, you are not able to describe those documents accurately, are you? A Some I can describe accurately.

"Q All the way through and as to language, etc.? A I could not reproduce every word on these documents.

"Q In view of that, and looking at these photographs, do they depict the documents which you removed from the defendant?

"A Yes, sir.

"MR. PERRY: To the questions your Honor just asked, may I reserve an objection to them also?

"THE COURT: Objection overruled.

"MR. PERRY: Exception." [55]

XXXV.

The court erred in admitting documentary evidence over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

"Q Did you retain possession of the papers taken from the defendant Rocchia? A I did until along about the first part of February, I don't recall the exact date.

"Q Did you make any reproductions of those papers prior to the 1st day of February? A Investigator Hauptman in my presence made photographs of these papers, developing negatives, and made the prints.

"Q All in your presence? A All in my presence.

"Q Did you do anything to identify these documents as being the documents that were made in your presence A Yes, I wrote my initials and the date on the back of each one.

"Q Anybody else's initials *palced* there? A Yes.

"Q Who? A Investigator Hauptman's initials.

"Q Were they placed there in your presence? A Yes.

"MR. GOULDEN: We ask that they be received in evidence as Government's Exhibits next in order.

"THE COURT: Government's Exhibits 7 and 8.

"MR. PERRY: I object to their introduction upon the ground that the originals are the best evidence; upon the ground that a complaint was filed before the United States Commissioner on January 10, 1933, charging this defendant with a violation of the National Prohibition Act, signed William P. Goggin; and a petition for the exclusion and suppression of evidence and the return of property was made and an order was made for the return of the personal property, signed by Judge Kerrigan, upon the [56] dismissal of the case, which are referred to in Defendant's Exhibit 1 for identification. I object to it upon the ground that the receipt of these documents is prejudicial to the defendant and violates his constitutional rights, particularly as respects Amendments Four and Five. In respect to the objection to the introduction of the photostatic copies in evidence, as a preliminary matter I wish at this time, for the purpose of the record, to offer in evidence the documents I referred to, and particularly those documents which are now part of Defendant's Exhibit 1 for identification.

"THE COURT: The objection will be overruled and the offer will be denied.

"MR. PERRY: Exception.

XXXVI.

The court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

"Q Who was present when they returned besides yourself?

"A The defendant Rocchia.

"Q In other words, when the two agents returned there were four men in the still room? A Yes.

"Q What conversation did you have, if any, with either of the agents Goggin or De Kalb upon their return?

"MR. PERRY: For the purpose of preserving the record, I am going to make the same objection to this question, that is, the constitutional objection.

"THE COURT: Objection overruled.

"MR. PERRY: Exception.

"A Investigator Goggin walked over in front of the defendant [57] Rocchia, who was seated on a yeast box or on a five-gallon can and stopped in front of him and looked down and said, 'Well, John, it looks as if you have the big shot.' "

XXXVII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Agent Burt (continuing)

"Q Was there any further conversation either between yourself and the defendant or between

yourslf and the two agents with you in the presence of the defendant? A After the money had been counted and returned to the defendant Investigator Goggin turned to me and said——

"MR. PERRY: Now, just a moment. I am sorry to interrupt but I think probably the line of answer would be along the line of the other testimony, and I wish to make this objection, that any statement that Goggin might make in the presence of this defendant is purely self-serving as far as the agents, themselves, are concerned. In fact, they could make any statement they pleased in the presence of any defendant, including this defendant, and then could take the stand and say they said such and such in front of a certain defendant, whereas as a matter of fact it is not binding upon the defendant at all, it is purely self-serving.

"MR. GOULDEN: The purpose of the question is to develop what the defendant did under the circumstances.

"THE COURT: I will allow the question.

"MR. PERRY: Exception. [58]

"A Investigator Goggin said, 'Didn't he try to pay off?' And I said, 'Yes, he did.' "

XXXVIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

"Q Was there any further conversation? A He was then questioned——

"MR. PERRY: Just a moment, please. I am going to object for the purpose of the record to

any further testimony as to what was said and done upon the grounds heretofore urged, the same grounds heretofore urged.

"THE COURT: Objection will be overruled.

"MR. PERRY: Exception.

AGENT BURT (continuing)

"A. He was then questioned in the presence of all of us and he stated that he had been approached by a strange man down on Third Street who had given him the key and told him if he would go up to 60 Brady Street he might find some work, that he knew nothing about the still or its ownership. At that point he refused to answer any further questions."

XXXIX.

The Court erred in admitting documentary evidence over the objection of the defendant as will more fully appear as follows:

"MR. GOULDEN: I ask that the can of alcohol be admitted into evidence as Government's Exhibit next in order. [59]

"MR. PERRY: I am going to object to it solely upon the constitutional ground, that any evidence that might be taken in the place, such as the offer now being made, would violate the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled. It will be received as Government's Exhibit 9 in evidence.

"MR. PERRY: Exception."

XL.

The Court erred in admitting in evidence certain testimony over the objection of the defendant, as will more fully appear as follows:

Harold Von Husen testified:

"Q I show you Government's Exhibit 8 (in evidence) and ask you if that is a true photo or copy of the note you left under the door?

"MR. PERRY: I am going to object to the question upon the ground that any testimony which this witness might give with respect to Government's Exhibit 8 will violate the constitutional rights of the defendant on trial, particularly as respects amendments Four and Five. I repeat for the purpose of the record that a complaint was filed before the Commissioner charging the defendant with violating the National Prohibition Act in January of 1933 for the same offense for which he is being charged here now, arising out of the same transaction, and that a motion to suppress was filed, and that the matter was dismissed, I mean the case was dismissed as to Rocchia; that an order in the District Court was signed ordering the return of all papers, and that those documents are contained in Defendant's Exhibit 1 for identification. The document that the witness now refers to is a photostatic copy, as I understand it from previous testimony, of certain papers that were taken from the defendant Rocchia's person.

"THE COURT: The objection is overruled. [60]

"MR. PERRY: Exception.

"A That is a true copy."

XLI.

The Court erred in refusing to admit in evidence certain testimony offered by the defendant as will more fully appear as follows:

E. E. Williams, U. S. Commissioner, testified relative to hearing on complaint and motion to suppress pending before him (and which is part of Defendant's Exhibit No. 1 for identification) as follows:

"I think I stated that my records would indicate that there was no ruling on the motion to suppress, because I have a notation here that Abrams, the Assistant United States Attorney, consented to the dismissal of Caruso and Cappi. There could have been a ruling on the motion to suppress but it would have been unnecessary, and I would have indicated it had I made a ruling; in other words, I would have disposed of the entire matter so far as those particular issues were concerned either by making a holding or a dismissal.

"MR. PERRY: I now offer the petition to suppress and to exclude evidence in evidence.

"THE COURT: We have testimony here that that was never acted upon and consequently it would not be a part of this case, so far as the Commissioner's testimony goes. The fact that it was filed in the case has no bearing here unless it was acted upon. Nobody has testified to that effect. It is part of Exhibit 1 for identification.

"MR. PERRY: I will take an exception to your Honor's ruling. I offer at the same time again the

order for the return of the property, signed by Judge Kerrigan in the same proceeding [61] which is a part also of Defendant's Exhibit 1 for identification; I offer that in evidence.

"THE COURT: The same ruling.

"MR. PERRY: Exception."

XLII.

The Court erred in admitting documentary evidence over the objection of the defendant, as will more fully appear as follows:

Emile Canepa testified as follows:

"The notation on the third sheet of U. S. Exhibit 7 which I now hold in my hand is in the Italian language. I have made a true and correct translation of that into the English language and the document which you now hand me is that true and correct translation.

"MR. GOULDEN: I offer this translation in *evicence* and ask that it be marked Government's Exhibit next in order.

"MR. PERRY: I object to it on the ground that it would have a tendency to and would violate the constitutional rights of this defendant, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled. It will be received as Government's Exhibit 11.

"MR. PERRY: Exception."

XLIII.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows: [62]

EDWARD O. HEINRICH testified as follows:

"I have examined the finger print on the card, Government's Exhibit No. 3, John Caruso. I have also examined the finger print on the card Government's Exhibit No. 7 for identification, Antonio Rocchia.

"Q Are you prepared to say whether or not the finger prints are of the same man? A I am——

"MR. PERRY: Just one moment, please. I am going to make an objection now, and I will make an objection later on; I am going to object to the further use of the finger prints. As I understood it, when these documents were introduced in evidence first the only use of the documents was for the purpose of the handwriting. Now counsel for the Government endeavors to use by way of comparison the finger prints on those two cards, and [63] by those two cards I mean Government's Exhibit No. 3 in evidence and Government's Exhibit No. 7 for identification. I mention this at this time, your Honor, because they are trying to introduce or show prior transactions that this defendant may have had in other matters and to bring it in in this manner, and which could not have been brought into this court in any other way. In other words, by a subterfuge they are bringing in under the guise of the handwriting matter something to use against

this defendant. I object to it on that ground as a matter of principle.

"THE COURT: It is certainly pertinent evidence and I will overrule the objection. Let us proceed with the examination.

"MR. PERRY: Exception."

XLIV.

The Court erred in admitting in evidence certain testimony over the objection of the defendant as will more fully appear as follows:

Edward O. Heinrich (continuing)

"Q Would you say at this time in your expert opinion that the finger prints on the two cards just referred to, Government's Exhibit No. 7 for identification and Government's Exhibit No. 3, are one and the same man?

"MR. PERRY: I object to it on the ground that the use of these documents is prejudicial so far as the defendant Rocchia is concerned, and I assign the examination and the use of those documents with respect to finger prints by the United States Attorney as misconduct, and I ask your Honor to instruct the jury to disregard it.

"THE COURT: The objection will be overruled.

"MR. PERRY: Exception.

"A They are the finger prints of one and the same individual."

XLV.

The Court erred in admitting documentary evidence [64] over the objection of the defendants as will more fully appear as follows:

"MR. GOULDEN: I neglected or I overlooked requesting that Government's Exhibit No. 7 for identification be admitted in evidence. Professor Heinrich identified it, that being the finger print card with the signature Antonio Rocchia upon it.

"MR. PERRY: I object to it as immaterial, irrelevant, and incompetent, and upon the ground that it is prejudicial to the rights and interests of my client to introduce this document in evidence bearing his purported finger prints and his signature; it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

"THE COURT: Objection overruled. It will be received as U. S. Exhibit 14 in evidence.

"MR. PERRY: Exception."

XLVI.

The Court erred in denying the motion of the defendant made at the conclusion of the plaintiff's case, the defendant thereupon resting, there being no evidence introduced on behalf of defendant, that the jury be instructed to return a verdict of not guilty as will more fully appear as follows:

"MR. PERRY: I wish at this time to make a motion for a directed verdict. The motion for di-

rected verdict goes first to indictment No. 24941-L. The grounds of my motion are as follows:

"That the facts and allegations set forth in indictment No. 24941 do not constitute an offense against the laws of the United States because the allegations contained in counts 1, 2, 3, 4, 5, 6, and 7, and each of them, and with respect to them separately and severally, do not constitute an offense against the laws of the United States.

"Furthermore, on the ground that because in the trial of the case the evidence adduced on all counts and on each count, [65] separately and severally, of indictment No. 24941-L, showed that the discovery of the commission of the crime, if any, was secured by unlawful search and seizure, and in violation of the rights guaranteed to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States, by reason whereof this Court has no jurisdiction to hear and determine said cause, or any part thereof.

"On the further ground because the indictment in each count, separately and severally, is vague, uncertain, and indefinite, and does not sufficiently state or aver or set forth the alleged offense charged in said counts and each of them against said defendant, or the acts or facts constituting the same so as to apprise said defendant of the crime or the offense with which he therein stands charged.

"On the further ground because the evidence introduced as to indictment No. 24941-L, and as to each count of said indictment, separately and sev-

erally, was insufficient to support a charge under the indictment.

"Furthermore, because of error in admitting evidence as to any offense under indictment 24941-L, as to each count thereof, separately and severally.

"Further, upon the ground that there was admitted incompetent evidence offered by the United States.

"Further, that the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

"As a further ground, the misconduct of the United States Attorney, which was duly and regularly assigned during the course of the trial and exceptions to which were taken."

XLVII.

The Court erred in denying defendant's motion for new trial, to which ruling defendant then and there duly excepted. [66]

XLVIII.

The Court erred in denying defendant's motion in arrest of judgment, to which ruling the defendant then and there duly excepted.

XLIX.

The Court erred in pronouncing judgment and sentence against defendant, to which the defendant then and there duly excepted.

WHEREFORE, for the many manifest errors committed by said Court, the defendant prays that

said sentence and judgment of conviction be reversed; and for such other and further relief as to the Court may seem meet and proper.

Dated at San Francisco, California, this 3rd day of July, 1934.

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for Defendant.

Service of a copy of the within Assignment of Errors admitted this 7th day of July, 1934.

H. H. McPIKE
United States Attorney
By R. B. McMILLAN
Assistant United States Attorney.

[Endorsed]: Filed Jul 9 1934 [67]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS ON BEHALF OF DEFENDANT ANTONIO ROCCHIA

BE IT REMEMBERED, that heretofore, towit, on November 14, 1933, the Grand Jury of the United States, in and for the Northern District of California, Southern Division, did find and return into and before the above entitled court its indictment against Antonio Rocchia, Frank Ferrari and Silvio Cappi.

AND BE IT FURTHER REMEMBERED, that thereafter, towit, on December 23, 1933, the said

defendant Antonio Rocchia subscribed to and filed a verified document termed "Plea in Abatement and Motion to Suppress Evidence;" that on the same day, towit, December 23, 1933, the hearing on said Plea in Abatement and Motion to Suppress Evidence was set for January 6, 1934, by the court; that said Plea in Abatement and Motion to Suppress Evidence and Documents taken at the time of the arrest of defendant was based upon the alleged ground that said taking was in violation of the constitutional rights of said defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution of the United States. That thereafter and on [68] January 6, 1934, Thos. G. Goulden, Esq., Assistant United States Attorney, and Geo. J. Hatfield, Esq., attorney for defendant, being present in court and answering ready for all parties, the following proceedings were had: The Plea in Abatement was submitted to the court without argument thereon on behalf of defendant and taken under advisement by the court, and thereafter upon stipulation of the parties and consent of the court that the hearing on the Motion to Suppress might be had prior to ruling of the court on the Plea in Abatement without prejudice to the rights of any of the parties, the following proceedings were had: "John M. Burt, called for the United States, being duly sworn, testified as follows: Direct examination. I am an investigator in the Bureau of Investigation, Department of Justice, and I was such on January 9, 1933, and prior thereto. On or about January

9, 1933, I made an investigation of the premises known as 60 Brady Street. On that day investigator Goggin told me in the presence of investigator De Kalb that he had gotten information that a distillery was in operation at said premises. At 4:30 P. M. on that day the three of us proceeded to the vicinity of that address and observed a strong odor of fermenting mash and distillation in the vicinity; that odor was traced to 60 Brady Street. The Court: When you say "traced" you mean you approached the premises and determined to your satisfaction the odor came from them? A. Yes. Standing at the door of No. 60 Brady Street I could hear the roar of a gas burner and the hum of motors inside, and then observed the odor of distillation. Q. Where were you standing when you heard the hum of the motors? A. On the sidewalk in front of 60 Brady Street. Investigator Goggin slid back the front door, which was not fastened. Be- [69] fore doing so we had observed the odor of fermenting mash, and there was a sign up over one of the doors indicating that a drayage company was operating in there. We looked in through the glass and saw no drays—— Q. How near the sidewalk was that? A. We were on the sidewalk at the time. Q. How far away did you look through? A. This was right on the sidewalk. We could see in about 20 or 25 feet back from the front what appeared to be a newly erected partition, and through one small aperture at the top of that partition I saw a light coming through and I saw what appeared to be the top of a large

door that had been cut in the partition, but was concealed all but about six inches by a large pile of pasteboard cartons. There were truck tracks running back along that pile of cartons apparently through that doorway. Investigator Goggin then slid back this door, which was not fastened, and we entered the building. Q. Just stop there for a minute. You had smelled what you thought was fermenting mash? A. Yes. Q. You had heard the hum of motors? A. Yes. Q. Had you heard any sound indicating anybody was present on the premises? A. No. Q. Proceed. A. In this partition was another small door which Investigator Goggin opened, it being unfastened, and we entered the rear part of the premises. We there saw a man standing by an alcohol receiving tank drawing alcohol into a five-gallon can, and a large alcohol distillery in full operation, full of mash and sacks of sugar. He was placed under arrest. He gave the name of Ferrari. Investigator De Kalb remained in the still room with him and Investigator Goggin and myself went out in the front part, it was dark, and sat down. At 6 p. m. we heard this noise on the lock of the door, the door opened, and a man entered and proceeded toward the small door in the partition, and we stepped out and placed him [70] under arrest. He had in his possession the key which fitted the lock on the front door. His name was Silvio Cappi. Investigators De Kalb and Goggin proceeded with the two prisoners, after questioning them, to the Southern Police Station. At 8:10 p. m., it being now quite dark, I was in the

front part of the building, had left an electrical blower or fan in operation near the front of the building, and the lights turned on, and I went out in front in the darkened front portion, and at 8:10 p. m. I heard on the sidewalk on the outside the side of a key being inserted in the lock, I heard the door opened and closed, and a man stepped down into the main part of the building and started toward the rear, at which time I placed him under arrest, and told him to come on back to the still room. He went back through the same small door which I had to use, finding his way in there in the dark. After we had entered he asked me if I really was a prohibition agent, and I told him that I was, and showed him my credentials, and I then made a search of his person and found on him a number of papers bearing the name of Antonio Rocchia. I asked him if Rocchia was his real name and he told me it was. Some of these papers gave me reason to believe that he was the owner of this distillery, and had also on his person $1600 in currency with which he attempted to buy his release, and he had in his pocket the key, which was subsequently removed by Investigator Goggin, and which also fitted the lock on the front door. Upon the return of Investigators Goggin and De Kalb the defendant was questioned and then gave the name of John Caruso. He denied connection with the still, and would not make any admissions, whatever. We were in almost constant conversation for a matter of two hours; he made a great many statements at that time, and one to the effect that if I let him go at that

time [71] he would set up another distillery and pay me regularly, and also introduce me to one or two other men who would also pay me. He did not admit ownership of the still or any connection with it. The Court: As I understand, the door was not locked? A. No. Q. It did not have to be opened by the handle of the door? A. It had to be slid open. Q. It was not locked? A. No. Q. But the door was actually closed and you had to slide it open? A. Yes. Q. And you had no warrant? A. No. Cross Examination. The door through which the defendant Rocchia came was not the same door that Goggin slid open. There are two doors to 60 Brady Street; one is a large driveway door and the other is a small door. The small door is on the righthand side as you face the building. That is the first door which Rocchia came through. As you enter that small *dor* there is a flight of steps leading upstairs directly ahead and directly to the left there is another door leading into the front part of the building. Then at the back of that room is the *partitition* that I spoke about with a doorway into the still room. All but the top of the driveway door in that partition was covered by cartons stocked in front of that partition. They were all empty and had light wooden framework built around them so that they could be slid to one side, which disclosed this driveway through the partition. When the defendant Rocchia came to 60 Brady Street he came through the small door that leads into the small room. At that time I was in the large room. You could call it the store room in

front of the still room. I testified in this matter before the United States Commissioner. Mr. Hatfield: I want you to take a look at page 2, here, and I will ask you whether or not you gave that testimony at that time. A. Yes. Q. In other words, before, when you were [72] testifying, you said that 'At 8:10 p. m. I was out in front of the building and saw a fellow walking up on the sidewalk outside, heard the footsteps, and heard the footsteps stop at the same door where Cappi had entered.' Did you give that testimony? A. I certainly cannot recall saying that I saw him walk up —I as out in the front part of the building. Q. You did not say you were in the *frong* part of the building, you say you were in the front of the building. A. It was not my intention to give any such testimony as that, I was in the front part of the building. If I had been on the outside part of the building I would have seen him. Q. Whereabouts were you? A. I was in the front part of the building. At that time the building was divided into a large room at the rear which was used for the still, and the front part of the building was divided up by a partition into two small rooms. Both of these rooms were in front of the still room. In addition there was a little ante room through which the door led, that these men came in through. When Rocchia came in I was standing in the small front room which was on the righthand side of the building as you stand facing the building. That is the room in front of the still room. Mr. Hatfield: Q. So if

you testified you were out in front of the building you testified to something that was not correct? A. If I testified I was out on the sidewalk I testified to something that was not correct. Q. After you testified I cross-examined you, and I will ask you whether you did not testify you were on the stairs going up into the mezzanine. A. No. Q. You are quite sure of that? A. Yes. Q. Now, I will ask you to read your testimony there that you gave under cross-examination, and ask you whether you answered those questions or not. A. This is absolutely not my testimony. I was on the way to those [73] stairs to go up on the mezzanine floor. Q. Then it is not your testimony at this time, you did not testify in reply to my question, 'At what time did the defendant Caruso arrive? A. At 8:10 p. m. Q. By that time the other agents had left and you were alone there: Is that correct? A. Yes. Q. And you were standing out in front? A. I was standing just in the stairs that lead up to the mezzanine floor.' You did not testify to that? A. I do not recall any such testimony, no. Q. You are positive that you did not testify to that? A. I am quite positive that I did not. Q. In other words, that is something that you did not say, and if the reporter took it down it is not the truth? A. Yes. I was on my way to the stairs, but what my exact words were at the time I do not recall. The Court. Is there any question but that it is a true transcript? Mr. Goulden: I have never seen it, I did not even know there was a transcript. Mr. Hatfield: There is a

stairway leading to the mezzanine floor, is there not? A. Yes. "Witness continuing: When De Kal*k* and Goggin and I got to the premises we did not go around that, around in back; we were in the first street intersecting Brady Street which would put *is* in a way inside of the building and to rear of it; were not directly to the rear of the building. The building does not run through one street to the other street, there. I did not go to the back of the premises at all. We were not close up against the back of the building. We were in this intersecting street where we could see the rear of the building. Before I entered that place I did not see or hear anyone in the place. I just heard the burners. I did not make any attempt to get a search warrant. It was our information there would be a change in the situation if we took the time to get a search warrant. It was 4:30 in the afternoon. [74] Cappi got there about 6:00 o'clock. The search of the premises was completed around 11:00 o'clock that night. The search had not been completed at the time Cappi got there. Mr. Hatfield: You testified in this case before the Commissioner, didn't you? A. Yes. Did you say one word about any money being offered you before the Commissioner? A. I had no opportunity to give any testimony whatever about any money. Q. You did not have any opportunity? A. No."

AND BE IT FURTHER REMEMBERED, that thereafter, towit, on February 2, 1934, prior to the ruling of said court on said Plea in abatement and motion to suppress the said defendant Antonio Roc-

chia subscribed to and filed a verified amended plea in abatement and motion to suppress documents and evidence taken at the time of his arrest upon the ground that said taking was in violation of the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments to said Constitution; that after hearing and consideration of said motion as amended the same was by the court denied and an exception was thereunto duly and regularly by said defendant taken. Said amended plea in abatement is not part of this appeal and the motion to suppress evidence as amended was, in the words and figures following, towit:

"(Title of Court and Cause.)

"AMENDED PLEA IN ABATEMENT AND MOTION TO SUPPRESS EVIDENCE.

"Pursuant to order of court first had and obtained to file this Amended Plea in Abatement and Motion to Suppress Evidence, now comes ANTONIO ROCCHIA, one of the defendants above named and pleads in abatement of the indictment on file in the above entitled matter and to each and every one of the several separate counts therein contained, and moves to suppress evidence, and in that behalf alleges as follows:

"That on or about January 9, 1933, certain Federal Pro- [75] hibition Agents, towit: John N. Burt, William P. Goggins and Keith De Kolb, without observing the commission of any offense in their presence and without a search warrant au-

thorizing the search of the premises hereinafter referred to, and without a warrant for the arrest of the defendants or any of them or any other person, entered and searched the premises located at 60 Brady Street, San Francisco, California, and obtained therein certain knowledge and information. That thereafter and on or about the 9th day of January 1933 said prohibition agents without observing the commission of any crime by the defendant Antonio Rocchia and without having probable cause to believe that the defendant Antonio Rocchia was committing or had committed a felony or any other crime, arrested Antonio Rocchia and at said time said agents did not have grounds for the arrest of Antonio Rocchia. That as a result of the search of said premises said officers found certain properties which they seized. That said properties so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time the same was seized as aforesaid. That as a result of the arrest of said Antonio Rocchia, said officers found certain property, papers and effects in the possession of said Antonio Rocchia which they seized. That the entry, search and seizure, as aforesaid, were and each of them was and is illegal and in violation of the rights of Antonio Rocchia under the Fourth and Fifth Amendments to the Constitution of the United States. That said property so seized, as aforesaid, was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time of its seizure.

"WHEREFORE, petitioner prays that the searches and seizures be set aside and be declared null and void and the Court order [76] and direct the United States Marshal, Clerk and Federal Prohibition Officers to suppress and exclude from evidence any property so seized by reason of said illegal search from the trial of said cause, as well as all knowledge derived from their seizure be excluded from evidence and entirely suppressed, and that said proceedings be abated.

"ANTONIO ROCCHIA
Petitioner
"GEO. J. HATFIELD
Attorney for Petitioner.

"BY STIPULATION AND GOOD CAUSE APPEARING THEREFOR it is hereby ordered that the defendant Antonio Rocchia, may file the foregoing AMENDED PLEA IN ABATEMENT AND MOTION TO SUPPRESS EVIDENCE.

"HAROLD LOUDERBACK,
Judge

State of California,
City and County of San Francisco.—ss.

"ANTONIO ROCCHIA, being first duly sworn, deposes and says:

"That affiant is the petitioner named in and making the above and foregoing AMENDED PLEA IN ABATEMENT AND MOTION TO

SUPPRESS EVIDENCE; that affiant has read said Amended Plea in Abatement and Motion to Suppress Evidence and knows the contents thereof; that the same is true of affiant's own knowledge except as to matters which are therein stated upon information and belief and that as to those matters affiant believes it to be true.

"ANTONIO ROCCHIA

Subscribed and sworn to before me this 30th day of January, 1933.

MAUDE REYNOLDS
Notary Public in and for the City and County of San Francisco, State of California. My commission expires June 23, 1934.

(Seal) [77]

(ENDORSED: "No. 24941-L IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. UNITED STATES OF AMERICA, Plaintiff, v. FRANK FERRARI, SILVIO CAPPI and ANTONIO ROCCHIA, Defendants. AMENDED PLEA IN ABATEMENT AND MOTION TO SUPPRESS EVIDENCE. FILED FEB-2 1934 WALTER B. MALING, Clerk. GEO. J. HATFIELD, ESQ., Attorney at Law, 333 Montgomery St., San Francisco, California.")

Thereafter and on February 3, 1934, and in the absence of the attorneys for both parties, the court entered its order that the Motion to Suppress as

amended having been heretofore submitted, and due consideration having been thereon made, it is further ordered that said Motion to Suppress Evidence as amended be and the same is hereby denied, and an exception was duly and regularly taken thereto by said defendant.

AND BE IT FURTHER REMEMBERED, that thereafter and on February 10, 1934 said defendant Antonio Rocchia pleaded not guilty to said indictment; that said defendant was called for trial on said indictment on Tuesday, June 26, 1934. That said indictment came on for trial on the date aforesaid before the Honorable Harold Louderback, District Judge of said court, the United States being represented by Thomas G. Goulden, Esq. and Valentine C. Hammack, Esq., Assistant United States Attorneys, and the defendant Antonio Rocchia being represented by Frank J. Perry, Esq., and the following proceedings were had.

Thereupon, the jury having been sworn to try the case, Thomas G. Goulden, Esq., Assistant United States Attorney, made an opening statement of the case to the jury as to the matters the United States expected to prove, whereupon the following proceedings were had.

MR. GOULDEN: I desire to read from a portion of the Amended Plea in Abatement and Petition to Suppress Evidence. [78] It was filed February 2, 1934. It is signed by Antonio Rocchia and subscribed and sworn to before Maude Reynolds, January 30, 1933.

MR. PERRY: I admit the signature of Antonio Rocchia on that document. I object to it upon the ground that that document is an ex parte document. Counsel is seeking to read it into evidence as part of his case. I object to it on that ground.

THE COURT: Any statement made by a person, whether under oath or not, that is, by a defendant on trial, may be received as against him. You have conceded that the signature is his. It is to be presumed that he signed it with the idea in mind of proving what the document sets forth. I think it is admissible for such weight as the jury may desire to give to it.

THE COURT: It will be received as government's Exhibit No. 1 for identification. (The document was marked "U. S. Exhibit 1 for identification").

MR. PERRY: I wish to reserve an exception.

MR. GOULDEN: (Reading from amended motion to suppress) That as a result of the search of said premises said officers found certain properties which they seized. That said properties so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time the same were seized as aforesaid. That as a result of the arrest of said Antonio Rocchia said officers found certain property, papers and effects in the possession of said Antonio Rocchia, which they seized.

(EXCEPTION NO. 1.)

TESTIMONY OF KEITH DE KALB, For the Government.

KEITH DE KALB, called for the United States, being duly sworn, testified as follows: [79]

DIRECT EXAMINATION

I reside in the City of San Francisco. I am an investigator in the Alcohol Tax Unit, Bureau of Internal Revenue. I have been employed by the Federal Government for a little over six years. At the present time I am an investigator in the Alcohol Tax Unit. Prior to about three months ago I was an investigator in the Prohibition Unit of the Department of Justice. My first experience in Government Service was an inspector in the United States Border Patrol. On January 9, 1933 I was an investigator in the Bureau of Prohibition. On that day, in company with Inspectors Burt and Goggin, I visited the premises 60 Brady Street, San Francisco. Inspector Goggin had information to the effect that there was a distillery in operation at that place. Prior to this time I had made investigations and seizures and arrests concerning stills unlawfully in operation. When I visited the premises at 60 Brady Street on this day we detected a strong odor of distillation and of fermenting mash in the street in front of the building. Brady street runs from Market street to Otis street; it is near the intersection of Van Ness Avenue, or South Van Ness Avenue, rather, and Mission Streets. It is a narrow

(Testimony of Keith De Kalb.)
street. We approached the main doorway to the building. We could hear the sound of burners, blowers, etc. inside of the building. We could look through the front door of the building, which was glass in its upper portion; it was a sliding door with glass in the upper half. We could see inside a partition some thirty feet back of the door and a large pile of cartons against the partition; there were truck tracks running from the front door in front of which we were standing to the pile of cartons and disappearing under the pile of cartons. By truck tracks I mean large tire tracks. [80]

Q Did you receive any further indications while you were in that position, that there might be a still in the premises, or that the information you received was correct? A I have mentioned the smell and the sound, and these tracks. Q What was the sound that you heard? A. It was a roaring sound, a sound that is common to a gas burner when it is operating under pressure. Stills are usually operated in this vicinity by gas burners, the heat is supplied that way. The building was a concrete building. In the front it carried a sign indicating there was some kind of a drayage business conducted there. The building had a front of about 50 feet and was approximately 100 feet deep. There was no sign on the building, at all, to indicate that the business engaged in that building might be a distillery.

MR. GOULDEN: Q Then what did you do? A Investigator Goggin opened the door——

MR. PERRY: Just a moment. I am going to object, your Honor, to any further testimony as to

(Testimony of Keith De Kalb.)
what happened after the agents looked into the building, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution of the United States.

MR. GOULDEN: This matter of search has all been disposed of and it is too late at this time to make any mention of the legality or the illegality of the search.

MR. PERRY: For the purpose of the record I am renewing my objection.

THE COURT: Q What did you observe before you went in there? A We detected the odor of fermenting mash and distillation, which is distinctly different. We heard the sound of the burner in the plant. We could see a partition dividing the building crosswise; in front of this partition was a pile of cartons; there [81] was a pair of large tire tracks which went from the front door and disappeared directly under this pile of cartons.

Q Did you hear any other sound? A Other than the sound of the motors and burners, no, sir.

Q You did not hear anything that indicated that anybody was in there? A The sound of the motors and burners in operation.

Q You didn't see anything that indicated to you that anybody was in there; you heard no rattling of cans, did you? A No, sir. Q No people moving about? A No, sir; the other noise was so great that you could not hear anything else.

Q Was the door open? A It was open about an inch. It was a door that opened in three sections. It was not jammed all the way shut.

(Testimony of Keith De Kalb.)

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

MR. GOULDEN: Q As I understood it, then you entered the building? A Yes.

MR. PERRY: I would like to make this suggestion. I would like to have the objection I have just made, as violating the constitutional rights of this defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution, follow throughout this entire line of testimony.

THE COURT: I think it is necessary for you to make the objection each time you wish it on the record, Mr. Perry.

WITNESS (Continuing) Inspectors Burt and Goggin entered the premises with me. We went through the first room and took a door to the left. I may say that the partition which went crosswise of the building was——

MR. PERRY: Just a moment. I am going to object to the testimony as to anything inside the building, as far as the par- [82] tition goes, upon the ground that it violates the Fourth and Fifth Amendments to the Constitution so far as this defendant is concerned.

THE COURT: The same ruling.

MR. PERRY: Exception.

(EXCEPTION NO. 2.)

WITNESS (Continuing): The front part of the building, which is partitioned off by the partition which I have mentioned, is also divided by another

(Testimony of Keith De Kalb.)

partition, making two rooms. The room which we entered through the garage door is the larger of the two rooms and to the right as we face the building. We took a door leading into the other room which is to the left as we face the building; in that room we passed through a door that led to the back of the building. I identify this plan that I am now shown as a diagram of the floor plan of the building at 60 Brady Street at the time the distillery was in it. I prepared that diagram, myself. I can mark the door we went through with the figure "1" and then proceed and enumerate the various doors we went through.

MR. PERRY: I am going to object to any testimony the witness might give, either with respect to the diagram he has in his hand or to what he did when he went inside the still room, upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception.

WITNESS (Continuing): This is a correct diagram to the best of my recollection of the premises. It is not to scale [83] but it indicates absolutely the general floor plan. I have marked the doors 1, 2, and 3; 1 being the first door through which we entered, 2 being the second door, and 3 being the third door. The second door is the door that leads into the room immediately to the left of the garage door as we enter. We then proceeded through a

(Testimony of Keith De Kalb.)
door in the back wall there and that permitted us to enter the still room proper. That door that I refer to is marked Door 3.

(EXCEPTION NO. 3)

MR. GOULDEN: Q What did you find in the still room as shown on the diagram there? (Government's Exhibit No. 1 in evidence)

MR. PERRY: I object to the witness testifying to anything he found in the still room upon the ground that it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

THE COURT: The same ruling.

MR. PERRY: Exception.

WITNESS (Continuing): We found a distillery that was producing between 500 and 1000 gallons of alcohol a day. There were some 30,000 gallons of corn sugar mash, a 500-gallon still, and a 250-gallon still, and over 1000 gallons of alcohol and whiskey. The man who was in charge of the premises at that time we arrested; he gave the name of Ferrari. We entered there about 4:30 o'clock in the afternoon. of January 9, 1934. We arrested him immediately and we questioned him and we searched him.

(EXCEPTION NO. 4)

MR. GOULDEN: Q What did you find when you searched the [84] defendant Ferrari?

MR. PERRY: I make the same objection that I just previously made for the purpose of the

(Testimony of Keith De Kalb.)
record, your Honor. Will there be the same ruling? I will make the objection this way, your Honor: I object to any statements to be given by this witness with respect to the last question propounded to him on the ground that it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments to the Constitution.

THE COURT: Q You arrested the defendant right there? A Yes. Q Right in the still house? A Yes; this was Frank Ferrari.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

WITNESS (Continuing) We found on his person a key which fitted the front door of the building; (U. S. Exhibit No. 2 for identification and later as U. S. Exhibit No. e in evidence)

(EXCEPTION NO. 5)

WITNESS (Continuing) That door is to the extreme right of the building as one enters the building; I am marking it here on the diagram as No. 4. I fitted that key to the lock in the door and it fitted the lock and it could unlock that lock in the front door. This key that you show me resembles the key which was taken from the defendant Ferrari; I did not keep that key in my possession all the time, and I cannot recall from memory the exact detail of that particular key. Investigator Burt kept the key which was taken from Ferrari.

(Testimony of Keith De Kalb.)

MR. GOULDEN: May I introduce the diagram in evidence, your Honor, as Government's Exhibit next in order? [85]

MR. PERRY: We object to the document being received in evidence upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled. It will be received as Government's Exhibit 1.

MR. PERRY: Exception.

(The diagram was marked U. S. Exhibit 1.)

MR. GOULDEN: And may I place the key in evidence as an exhibit for identification?

THE COURT: Government's Exhibit No. 2 for identification.

(The key was marked "U. S. Exhibit No. 2 for identification.")

(EXCEPTION NO. 6)

MR. GOULDEN: Q Did you question Ferrari? A Yes. Q Did he make any statement?

MR. PERRY: I object to the question upon the ground heretofore urged, it violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A I am referring now to the original notes I took at the time that I questioned, or, rather, that

(Testimony of Keith De Kalb.)

Ferrari was questioned. At that time we asked him——

MR. PERRY: Just a moment, I object to this.

THE COURT: This will apply to the conspiracy count solely, as far as this particular defendant is concerned. That is the seventh count in Indictment No. 24941-L. It will be received against the defendant on that count solely.

A He stated that he did not know who the still and the liquor belonged to, that he had been operating the plant for two days. [86] As I recall it, he made no other statements.

WITNESS (continuing) I stayed in the still room with this defendant Ferrari; the other agents who were with me left this room going out the front door. About six o'clock they came back to the building, returned to the still room bringing with them a man who when questioned gave the name of Silvio Cappi. This man was searched and questioned. He had in his possession a key which was a duplicate of the key which was in the possession of Ferrari.

MR. GOULDEN: Q I show you what purports to be a key and ask you if you have ever seen it before.

MR. PERRY: I object to any testimony in respect to it upon the grounds heretofore urged, it violates the Fourth and Fifth Amendments to the Constitution so far as the constitutional rights of the defendant Rocchia are concerned.

(Testimony of Keith De Kalb.)

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

WITNESS (Continuing): This key I can come more nearly saying it is the same key, because at the time the key was in my possession I noticed the fact that it was a duplicate, it had been made by S. Orioli; however, I cannot say absolutely that that is exactly the same key taken off his person.

(The key was here marked "U. S. Exhibit 3 for identification," and later received as U. S. Exhibit No. 5 in evidence)

WITNESS (continuing) The key was turned over to Inspector Burt. Investigator Goggin and myself took the prisoners out of the building between 6:30 and 7:00 o'clock and took them up to our office and finger-printed them and took them down to the police station and booked them for violations of the Internal Revenue Law. Inspector Burt remained in the still room. to retain custody over the seizure. [87]

(EXCEPTION NO. 7)

WITNESS (continuing) At about ten o'clock in the evening Investigator Goggin and myself returned to the still building. At that time Investigator Burt was in the still room and had in his custody this defendant, Antonio Rocchia, who at that time gave his name as John Caruso. At that time Investigator Goggin and Investigator Burt, the defendant Antonio Rocchia and myself were the only ones present in the building.

(Testimony of Keith De Kalb.)

MR. GOULDEN: Q What transpired next?

A Investigator Goggin made the remark——

MR. PERRY: Just a moment. I am going to object to anything that may have transpired at this time upon the ground that it violates the constitutional rights of the defendant Antonio Rocchia, particularly as respects the Fourth and Fifth Amendments to the Constitution.

THE COURT: Q This was in the presence of the defendant on trial? A Yes.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

WITNESS (Continuing): Investigator Goggin, as I recall it, stated to Investigator Burt, "It looks like you have got the big shot." Investigator Burt said, "I have." or something to that effect. Investigator Burt said, "Search him and see what you find." The defendant Rocchia did not make any comments at this time, he stood mute.

(EXCEPTION NO. 8)

MR. GOULDEN: Q What did you do?

MR. PERRY: I object to anything this witness may have done in that respect, on the ground that it violates the constitutional rights of the defendant on trial, particularly with respect to [88] the Fourth and Fifth Amendments.

THE COURT: Q He was under arrest at the time, was he not? A Yes.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

(Testimony of Keith De Kalb.)

WITNESS (continuing): I searched the defendant and found in his inside coat pocket a long wallet in which there was a quantity of money. I counted this money and there was $1600, in currency. I counted this money on the floor. Investigator Goggin found in the defendant's pocket another key which matched the two keys he had already taken from the other two defendants. Investigator Goggin found that key in the coat pocket of Rocchia. We compared the three keys. I satisfied myself that that key was a key similar to those that have been presented here for identification as Government's Exhibits 2 and 3, the other two keys. (Later received in evidence as U. S. Exhibits Nos. 4 and 5 respectively.)

(EXCEPTION NO. 9)

WITNESS (continuing) In the presence of the defendant Investigator Goggin asked Investigator Burt if the defendant had not offered him the money for the purpose of securing his liberty, and Investigator Burt stated that he had, and humorously stated that it was a very tempting offer. The defendant did not say anything at that time.

MR. PERRY: If your Honor please, I wish to make an objection to that particular item of testimony just given upon the ground that it violates the defendant's constitutional rights, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception. [89]

(Testimony of Keith De Kalb.)

(EXCEPTION NO. 10)

MR. GOULDEN: Q Was anything further found on the person of Rocchia?

MR. PERRY: The same objection to that, your Honor.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

A Investigator Burt displayed some papers which he had already taken from the defendant and stated that he found them on the defendant's person. (U. S. exhibits Nos. 5 and 6 and later received as Nos. 7 and 8 in evidence.)

(EXCEPTION NO. 11)

MR. GOULDEN: Q Did you see these papers? A Yes. Q Did you examine them? A Yes. Q In a general way, what were these papers?

MR. PERRY: I object to any testimony by this witness, testifying in a general way, or in any way, with respect to the papers, upon the ground, first, that the original papers, themselves, are the best evidence; upon the second ground that it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments to the Constitution; upon the third ground——

THE COURT: What is the situation regarding these papers?

MR. PERRY: Upon the third ground that an order of the Court has already been made directing the return of the papers to the defendant. I wish

(Testimony of Keith De Kalb.)
at the same time, as part of the objection, to offer in evidence the record before the United States Commissioner, his Docket No. 3142, and particularly the documents—the complaint filed before the Commissioner, the order of Judge Kerrigan directing the return of certain documents, [90] and the bond of the defendant on trial. (Defendant's Exhibit #1 for identification)

MR. GOULDEN: I don't see the relevancy of this offer. There is nothing here that has any connection with this case. There is nothing to show any ruling was made on the so-called petition for exclusion. On that ground I object to it as entirely immaterial, *irrlevant,* and incompetent.

MR. PERRY: In that particular respect I wish to say that the matter was presented to the United States Commissioner, a motion to suppress was filed before the United States Commissioner, and the case was dismissed as to the defendant Rocchia on trial here.

THE COURT: Where is the petition upon which this is predicated?

MR. PERRY: That is a petition for the exclusion of evidence and the notice of motion.

THE COURT: I want the petition in No. 3142.

MR. PERRY: This is it, your honor. I will make it part of the same record. So there will be no confusion in the record your Honor, I wish to say that the case that was pending before the United States Commissioner was dismissed as to the defendant Rocchia.

(Testimony of Keith De Kalb.)

THE COURT: Let me ask counsel for the Government, are you intending to put in evidence any property which was returned by this Court to the defendant?

MR. GOULDEN: I intend to put in evidence, your Honor, exact photographs of these documents. The documents are in the possession of the defendant by an order of the Court. Under the well-known rules of evidence, where the evidence is in the particular and the peculiar custody of the other side, secondary evidence is permissible. [91]

THE COURT: That is not my point. Is this property which was covered by the order of Judge Kerrigan requiring its return to this defendant, are you contemplating offering that? Are you going to make any collateral attack on that order?

MR. GOULDEN: I don't know whether that order is subject to collateral attack at the present time, or not. It reads that a motion to suppress has been granted. Undoubtedly that was the reason for the court signing the order. The fact is that no motion to suppress had been granted. I have the word of the Commissioner, himself, on that, and he has filed an affidavit.

MR. PERRY: Counsel is giving testimony now, your Honor. The question your Honor asked counsel was whether or not any of the documents that were ordered returned by Judge Kerrigan were to be used on this trial. I understood that was the question your Honor asked counsel.

THE COURT: Of course, I think that the whole situation comes down to this, that the Court is to

(Testimony of Keith De Kalb.)
pass upon the legality of the arrest of this defendant, and that has not been presented to the Court as yet.

MR. GOULDEN: That has been presented to your Honor so far as the search and seizure were concerned. That has been presented to and passed upon by your Honor.

THE COURT: I do not at this time recall the facts.

MR. GOULDEN: It was submitted to your Honor both on oral arguments and on briefs.

THE COURT: I think you should produce the circumstances of his arrest here, just how it occurred. I do not recall those circumstances. This order is predicated on the supposed action of the Commissioner.

MR. GOULDEN: Yes. The commissioner has filed an affidavit [92] telling exactly what happened. He will testify, if required.

THE COURT: You expect to produce that testimony before the trial is over?

MR. GOULDEN: Yes. I could not anticipate whether it was going to be necessary, or not.

THE COURT: Under that assurance I will at this time overrule the objection of counsel.

MR. PERRY: So that there is not any confusion, if your Honor please, I made an offer of these documents in evidence. For the purpose of the record, and protecting the record, I would like to have them received in evidence. (Defendants Exhibit No. 1 for identification.)

(Testimony of Keith De Kalb.)

THE COURT: I will receive them for identification.

MR. PERRY: Your Honor, do I understand by that that they are not to be received in evidence? I am making the offer in evidence and not for identification.

THE COURT: They will be received for identification only.

MR. PERRY: Note an exception.

(The documents were marked "Defendant's Exhibit 1 for identification.

Said petition for exclusion of evidence and return of property signed by said Antonio Rocchia and filed before the United States Commissioner Ernest E. Williams and order of Frank H. Kerrigan for return of personal property read in full as follows:

Defendant's Exhibit for identification No. 1:

"IN THE UNITED STATES DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF CALIFORNIA.

"BEFORE United States Commissioner Ernest E. Williams. [93]

No. 3142

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN CARUSO,

Defendant.

"PETITION FOR EXCLUSION OF EVIDENCE AND RETURN OF PROPERTY

"That on or about January 9, 1933 certain Federal Prohibition Agents without observing the commission of any crime by your Petitioner and without having probable cause to believe that your Petitioner was committing or had committed a felony, arrested your Petitioner and at said time said agents did not have grounds for the arrest of your Petitioner.

"That on said date said Prohibition Agents searched the premises located at 60 Brady Street, San Francisco, California, and obtained therein certain knowledge and information.

"That said officers did not witness the commission of any offense in their presence, nor did they have a warrant for the arrest of your Petitioner, or any other person, nor did they have a search warrant authorizing the search of said premises.

"That as a result of the search of said premises said officers found certain property which they seized.

"That the search and seizure as aforesaid was and is illegal and in violation of your Petitioner's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

"That your Petitioner is informed and believes and therefore alleges that the United States Attorney for the Northern District of California proposes to use the property or evidence seized as aforesaid against your Petitioner and to confiscate

[94] "said property so seized as aforesaid and unless the same is suppressed and excluded and returned your Petitioner's rights as aforesaid will have been violated.

"That said property so seized as aforesaid was the property of your petitioner and was in the possession of your Petitioner at the time of its seizure.

"WHEREFORE, your Petitioner prays that the United States Attorney, Marshal, Clerk, Federal Prohibition Officer, by whatsoever *named* called, the Commissioner of Internal Revenue, his agents, assistants and inspectors, be notified that the Court direct and order said United States Attorney and the Officers above mentioned to exclude said property as aforesaid, as well as all knowledge derived from said search and seizure and return the property to your Petitioner so seized as aforesaid not confiscatory by law.

JOHN CARUSO

GEO. J. HATFIELD
Attorney for Petitioner"

"IN THE UNITED STATES DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF CALIFORNIA.

No. 3142

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN CARUSO,

Defendant. [95]

"ORDER FOR RETURN OF PERSONAL PROPERTY

"It appearing that on or about January 9th 1933 certain Federal Prohibition Agents arrested the Defendant, John Caruso at 60 Brady Street, San Francisco, California, and at that time and place searched the person of said Defendant, John Caruso, and found certain personal property which they seized consisting of operator's license, bank check and other personal property.

"That a hearing was had before United States Commissioner Ernest E. Williams on January 25th 1933 to determine the innocence or guilt of said Defendant, John Caruso, relative to his participation in the unlawful operation of a still located at 60 Brady Street, San Francisco, California; that a Petition for the Exclusion of Evidence and Return of Property was filed by John Caruso and said

Commissioner held that the personal property above referred to was unlawfully taken from the person of the Defendant, John Caruso; that the search and seizure were unlawful as to him and the proceedings thereupon dismissed.

"IT IS THEREFORE ORDERED that the personal property consisting of Operator's license, bank check and other documents taken from the person of the defendant, John Caruso, upon his arrest on January 9th 1933 at 60 Brady Street, San Francisco, California, be returned to him.

"The United States Prohibition Administrator is hereby directed to return said personal property to said defendant, John Caruso.

FRANK H. KERRIGAN
United States District Judge.

Approved:

I. M. PECKHAM
United States Attorney
S. A. A.

Filed Jan. 30, 1933 Walter B. Maling, Clerk By————————— Deputy Clerk" [96]

The complaint filed before United States Commissioner and a part of said Exhibit No. 1 for identification, was later received as U. S. Exhibit No. 10 in evidence.

(Testimony of Keith De Kalb.)

(EXCEPTION NO. 12)

MR. GOULDEN: Q Do I understand you to testify to having searched the defendant Rocchia? A Yes.

Q What did you find on the defendant when you made a search of the defendant?

MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of [97] the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. (Defendant's Exh. #1 for identification) The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The

(Testimony of Keith De Kalb.)
Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that [98] the documents, themselves, that they took from the defendant, Rocchia, are the best evidence.

MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

MR. PERRY: I object to that as an improper remark by counsel.

THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any docu-

(Testimony of Keith De Kalb.)

ments proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

THE COURT: The Court refuses to receive the instruction.

MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

THE COURT: The objection will be overruled.

MR. PERRY: Exception. [99]

(Testimony of Keith De Kalb.)

(EXCEPTION NO. 13)

MR. GOULDEN: Q Do I understand you to testify to having searched the defendant Rocchia? A. Yes.

Q. What did you find on the defendant when you made a search of the defendant?

MR. PERRY: For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. (Defendant's Exhibit Number 1 for Identification) The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I *objection* on those grounds.

MR. GOULDEN: There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says

(Testimony of Keith De Kalb.)
they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently [100] would show that, but I think we are entitled to show what those papers are.

MR. PERRY: I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

THE COURT: This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the *reception* of this evidence.

MR. PERRY: I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents themselves, that they took from the defendant Rocchia, are the best evidence.

MR. GOULDEN: There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

MR. PERRY: I object to that as an improper remark by counsel. [101]

(Testimony of Keith De Kalb.)

THE COURT: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

MR. PERRY: I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

THE COURT: The Court refused to receive the instruction.

MR. PERRY: I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

THE COURT: The objection will be overruled.

MR. PERRY: Exception. [102]

(Testimony of Keith De Kalb.)

MR. PERRY: And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remark. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

THE COURT: I don't recall any such statement on the part of the Court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

MR. PERRY: I ask your Honor to instruct——

THE COURT: You will find that I didn't suggest any subpoena or any other action.

MR. PERRY: You stated he could call on the defendant to produce certain documents.

THE COURT: The objection will be overruled.

MR. PERRY: I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.

MR. GOULDEN: Q Do you recall the last question:

A You asked me what I found when I searched the defendant Rocchia. I found a wallet containing $1600 in paper currency and a purse containing some other money. At the time I was searching him and Mr. Goggin was making part of the search we found a key which matched in all respects the keys that had been taken from the other defendants. This key you now show me resembles the

(Testimony of Keith De Kalb.)
key which was taken from the defendant Rocchia in that it has the name of the same manufacturer or the same key maker on it, and is the same general size and shape. I tried the key which was taken from Rocchia as well as trying the keys taken from the other defendants, in that lock and this [103] key operated that lock. The key that was taken from Rocchia operated the lock. This key which I am now shown resembles the key which was taken from the defendant Rocchia; I cannot say that it is exactly the same key. It was delivered to Investigator Burt.

(The key was here marked "U. S. Exhibit 4 for identification," and later received in Evidence and marked U. S. Exhibit No.) Nothing further was found on the person of the defendant Rocchia at this time. The amount of money that was in the small purse was something like $50. I don't know whether I know that because it was counted or because somebody remarked that there was $50 in it.

(EXCEPTION NO. 14)

MR. GOULDEN: Q Did you see anything further taken or purporting to have been taken from the person of the defendant Rocchia?

WITNESS (continuing): Investigator Burt displayed certain papers which he stated at that time he had taken from the person of the defendant Rocchia——

(Testimony of Keith De Kalb.)

MR. PERRY: Just a moment. The witness answered that before I had an opportunity to object. I object on the same grounds heretofore urged.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

MR. GOULDEN: Q Did you see these papers? (Government's Exhibits No. 5 and 6 for identification, and later received in evidence as U. S. Exhibit No. 7 & 8)

A Yes. Q Can you tell the Court and jury what these papers were? [104]

MR. PERRY: I am going to object to that on the ground that the papers, themselves, are the best evidence.

THE COURT: You can state what they appeared to be. I don't suppose you can characterize it as any particular legal document, unless it was a legal document, unless it was read.

MR. PERRY: I object to it further on the ground that any testimony he might give in this particular respect violates the defendant's constitutional rights, particularly with respect to the Fourth and Fifth Amendments; and on the ground based upon the previous offer with respect to the records before the United States Commissioner which were received for identification, and marked Defendant's Exhibit No. 1.

THE COURT: Objection overruled.

MR. PERRY: Exception.

(Testimony of Keith De Kalb.)

WITNESS (continuing): There was a list which was written partly in Italian and partly in English. The items ran "Zucchero," and then an item, something like $250. Yeast $55. There was an item Carabinieri $300. There was an item Canne, the amount I don't remember. These were all on one list. The items Zucchero and Yeast were repeated a number of times. There was an item about a carpenter $25. There was an item indicating the name Fran and an amount of money after it. There were several other items which I do not recall at this time. There was a receipt on a foreign money order showing the name Rocchia. There was a driver's license showing the name of Antonio Rocchia. There were a couple of money orders or deposit slips in the American Trust Company Bank, I believe, showing amounts of money deposited in the name of Rocchia. There was on the bottom of a sales ticket the name of Deneri and a telephone number. There were [105] certain cancelled checks. At this time I do not recall any other items but there were other papers, but I can't remember just what they were. One was a sales slip indicating an amount of sugar that had been sold. Investigator Burt had these papers in his possession, he retained them. I have seen an order of the files, an order of the court, ordering the return of certain papers, but I did not see them returned. I understood from our office the papers had been returned; they are not in the office at the present time. I found in the office duplicates or

(Testimony of Keith De Kalb.)

photographs——purporting to be photographs of the papers. I examined those photographs; they are true representations of the papers given to me by Mr. Burt and said to have been taken by him from the defendant Rocchia.

MR. GOULDEN: Q I show you a group of photographs of papers and ask you if you know what they are.

MR. PERRY: In order to lay the proper foundation, your Honor, I am going to object again to any testimony with respect to documents that he now has in his hands upon the ground that the originals are the best evidence; that there was a hearing before the United States Commissioner involving this same offense; that a motion to suppress was filed at the hearing and that the case was dismissed by the United States Commissioner, and that an order was made by Judge Kerrigan directing the return of certain papers. The record to which I just referred with respect to the hearing before the Commissioner is Defendant's Exhibit 1 for identification. I object to it upon the ground that by virtue of the order issued by Judge Kerrigan it violates the defendant's constitutional rights when he is called upon to give testimony and evidence against himself. I make my objection on that ground, your Honor. [106]

MR. GOULDEN: There is no question about the documents having been returned. I don't know it personally, I was not in the office at that time, but I understand there were. I know there is an order.

(Testimony of Keith De Kalb.)
The order makes no mention of the fact that these exhibits were passed upon by the Court, or that the Court had ever seen them. It is a consent order signed by the counsel, agreed to by the Government's counsel that they must be returned. It inadvertently states that a motion to suppress was granted by the Commissioner. Whether it was or was not is not binding on this Court. We will produce the Commissioner on the witness stand.

THE COURT: Any documents, if there were such documents, cannot be gotten at this time.

MR. GOULDEN: The Government has made no demand, your Honor.

THE COURT: I think the only thing that can be done is to have the witness testify whether this appears to be a copy of the true document taken from the defendant at that time. A All with the exception of these three checks which do not represent anything that were on the person of the defendant were shown to me by Investigator Burt.

MR. PERRY: Your Honor, may we have a ruling on my objection?

THE COURT: You mean the objection made last?

MR. PERRY: Yes, your Honor.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

THE COURT: Of course, you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself. There is no doubt but that these

(Testimony of Keith De Kalb.)
photographs can be taken into consideration if they [107] are true photographs of the documents that were upon the person of the defendant at the time which has been testified to.

WITNESS (Continuing) I notice the initials on the back of the photographs and also the date. They are the initials of Investigator Burt. I am familiar with his handwriting. The pencil initials appearing on this particular one are the initials of Sydney Hauptman, who was at that time in charge of the identification office, the identification section of our office, and took the photographs. He is out of the Government Service now and I understand that he is back in Arkansas. I would not know where to get hold of him at this time. These photographs appear to be exact replicas of the originals taken from the person of Mr. Rocchia; they resemble the photographs; I believe they are true photographs of the originals.

(The photographs were here marked U. S. Exhibits 5 and 6 for identification and later received in evidence as U. S. Exhibits Nos. 7 and 8, respectively)

(EXCEPTION NO. 15)

WITNESS (continuing) The defendant was questioned at that time. He stated that he did not know anything about the distillery, that he had been given the key by someone down there on Third Street who had told him that if he went to 60 Brady street and entered this building he might find something in the way of work. It was 6 or 6:30 o'clock

(Testimony of Keith De Kalb.)

when Goggin and I left with the two prisoners, Ferrari and Cappi. I don't know whether it was dark at that time, or not; it was dusk, however. It was the middle of winter. It was dark when we returned to the premises. The defendant Rocchia stated in my presence that [108] he did not know the party who gave him the key. I remained at the still premises all night. Burt and Goggin took the defendant Rocchia away from the premises at about 11 or 11:30 o'clock, I don't remember the exact time. Subsequently to this night I made other investigations concerning this case. I was present at the time a sworn statement was made by Mr. McKee and a sworn statement was made by Mr. Elligeroth. Mr. McKee is a real estate man on Mission street, and Mr. Elligeroth was one of his agents; the statement was taken relative to the renting of [109] these premises on Brady street. I was at the still premises off and on until all of the still equipment was removed. The seizure was turned over to some branch of the Army. On a date shortly subsequent to the seizure I was at the still premises with my wife. We took some pictures in the still room. I took two pictures on the night of the seizure and one picture on the following morning. These three small prints are prints of the picture that I took; these two were taken that night and this one was taken the following morning about daylight. Investigators Goggin and Burt are shown in this picture. They depict the condition as it existed on the night I entered the building, with the exception of the position of cer-

(Testimony of Keith De Kalb.)
tain hoses, I think certain hoses were turned around, and one shows a light that I put down on the floor in order to take the picture. With respect to the vats and the cans of alcohol and the sacks of sugar it is just the same.

MR. GOULDEN: I ask that these three photographs be offered in evidence as Government's Exhibit next in order.

MR. PERRY: I object to these photographs being offered in evidence on the ground that they violate the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments to the Constitution, by what they portray. They portray what has not been testified by way of evidence.

THE COURT: The objection is overruled; they will be received as Government's Exhibit 2 in evidence. They are received for the purpose of illustration.

MR. PERRY: Exception.

CROSS EXAMINATION

WITNESS: When Mr. Rocchia, the defendant on trial, arrived at the premises at 60 Brady street I was not there. It was [110] approximately ten o'clock when I saw Rocchia for the first time that night. With respect to the building itself, at 60 Brady street, there are two doors; there is one door on the right-hand side, which is a small door, and there is a door on the left hand side, which is a larger door. The door to which I refer on the left-

(Testimony of Keith De Kalb.)

hand side is, I believe, in about the middle of the building; it is divided into three parts that you can shove back. The large door was not locked. The little door was locked. As I stood at the door I could hear the roaring of the burners. Other machinery makes a roar, too, machinery in other lines of endeavor using burners. There was a sign on the building; I don't remember the exact wording of the sign, but it indicated there was some *sorth* of a drayage business being conducted there; I think it said McCarthy's Drayage, or some such name as that, I don't remember. When I say I counted the money out on the floor, the money which was taken from Rocchia, I mean that I laid it in piles on the floor. There were a great number of piles, there were fives, and tens, and twenties, and, as I recall it there was one $100 bill. I laid them in piles according to the denominations. There was in the still room, at the end of the still room, toward Brady street.

DIRECT EXAMINATION REOPENED

MR. GOULDEN: Does your office take finger prints of men taken into custody? A Yes.

MR. PERRY: I object upon ground that it is incompetent, irrelevant and immaterial whether they take finger prints or not.

MR. GOULDEN: It is preliminary, your Honor, to identifying the cards I have in my hand. These cards carry signatures. One of the proofs here that the government must make [111] is that this defendant signed a lease.

(Testimony of Keith De Kalb.)

THE COURT: You are hoping, in other words, to establish that by finger printing on the card?

MR. GOULDEN: I am hoping to establish it by identifying certain signatures.

WITNESS (continuing) The office keeps a file of those points. The signature is made at the time the finger prints are taken. I identify these two cards, one marked "Case No. 20895," and the other marked "S. F. 24928-F." They are finger prints that were in our file and that I removed a few days ago. I have no personal knowledge of either of those cards other than that I removed them from the files.

(Cards Nos. 20895 and 24927-F here marked U. S. Exhibit 7 for identification, and later Card No. 20895 was received as Exhibit No. 14 of the U. S. in evidence, and card S. F. 24928-F as U. S. Exhibit No. 3 in evidence.)

The government next called William P. Goggin, a government investigator, who had accompanied investigators De Kalb and Burt to 60 Brady Street, and he testified in corroboration of the testimony as aforesaid given by said DeKalb. That the same objections taken to De Kalb's testimony and exceptions to rulings of court thereon were taken to testimony of Goggin and for brevity and condensation of this bill of exceptions are not repeated herein, save and except the following:

(EXCEPTION NO. 16)

MR. GOULDEN: When you say the defendant Tony Rocchia, you mean the man sitting here at the defendant's table? A. Yes.

(Testimony of William P. Goggin.)

THE COURT: Q You mean the man on trial here? A. Yes.

MR. GOULDEN: Q Did you have any conversation with Investigator Burt at that time? A Yes, when I entered the prem- [112] ises.

Q Was it in the presence of the defendant? A Yes. Q What was that conversation?

MR. PERRY: I object to anything said by this defendant, or by the agents in the presence of the defendant, upon the ground that it violates the constitutional rights of this defendant, particularly with respect to the Fourth and Fifth Amendments. [113]

THE COURT: Objection overruled.

MR. PERRY: Exception.

A. I Said, "It appears that you have the big shot." Investigator Burt answered saying, "Search him and see for yourself."

(EXCEPTION NO. 17)

MR. GOULDEN: Q Did you search the defendant Rocchia?

MR. PERRY: I am going to assign the remarks of this witness in saying that Rocchia was the big shot as improper on the part of the witness and ask your Honor to instruct the jury to disregard it.

THE COURT: Q At that time nothing was said by the defendant at all, was there? A No, your Honor. Q He stood mute? A Yes, your Honor.

THE COURT: The objection will be overruled.

MR. PERRY: If your Honor please, this witness for the first time came into the room and he

(Testimony of William P. Goggin.)
said, according to his testimony, "It looks like he is the big shot." He never saw the man before. My objection is that any such remark upon the part of the witness is misconduct in making such a statement, and I assign it as such and I ask that the remarks be withdrawn and that the jury be instructed to disregard them.

MR. GOULDEN: The witness was asked what statement he made, or some question to that effect. If that is the statement that was made that is the only answer he can give.

MR. PERRY: This witness could have said anything he pleased when he stepped into that room. It is what the defendant might have said that counts. It is not what this witness could possibly say.

THE COURT: It is a question whether a man has a question directed to him or when things are said that apply to him, it is of moment to know how a man acts or what he says in response thereto. In this case these statements were made in his presence and he did not elect to reply. I will allow it to remain in the record.

MR. PERRY: Exception. [114]

(EXCEPTION NO. 18)

WITNESS AGENT GOGGIN (continuing): Investigator Burt tried the key in the lock of the door at 60 Brady street and it operated the lock. I stayed on the premises for about three quarters of an hour after finding defendant Rocchia present and then left with Investigator Burt to book the defendant

(Testimony of William P. Goggin.)
(Rocchia) at the City Jail. Before we booked him we took him to our office and finger printed him. Government's Exhibit No. 7 for identification (later received as U. S. Exhibit No. 3 in evidence) dated 1-9-33 is the finger print of John Caruso, and is one of the cards. We took three. Investigator Burt took them in my presence.

MR. GOULDEN: Q Whose finger prints are they?

MR. PERRY: That is objected to as being immaterial, irrelevant and incompetent. The United States Attorney stated that he wanted to use the writing or the signature on there as an exemplar. Whose finger prints they are does not make any material difference.

THE COURT: Objection overruled.

MR. PERRY; Exception.

A I saw the finger print made and I saw the finger of the defendant here on trial placed on the card so as to make these [115] imprints. I saw the card signed; it was signed by the defendant Rocchia in my presence. The signature that he placed on there was John Caruso, the name that he gave at the time that he was arrested in the still.

(The card was here marked U. S. Exhibit 3 in evidence.)

WITNESS (continuing): Investigating the case subsequent to January 9, 1933 I visited Mr. Thulin's office, accompanied by Investigator Burt, and secured a copy of the lease from Mr. Thulin. The lease was in the possession of Mr. Thulin at the time

(Testimony of William P. Goggin.)
I visited him. I identify this as the lease I got from Mr. Thulin; I placed my initials on the back of the lease. Investigator Burt was with me at the time and he also put his initials on it.

(The document was here marked U. S. Exhibit 8 for identification.)

In my investigation I also went to Mr. McKee's office on Mission street. I was accompanied by Investigator Burt and Investigator Grant. This was about four or five weeks after the seizure. Investigator Grant got a statement from Mr. McKee. [116]

The government next called John M. Burt, a government investigator who had accompanied investigators DeKalb and Goggin to 60 Brady Street and he testified in corroboration of the testimony as aforesaid given by De Kalb. That the same objections taken to De Kalb's testimony and exceptions to rulings of court thereon were taken to testimony of Burt and for brevity and condensation are not repeated herein save and except the following exceptions:

(EXCEPTION NO. 19)

WITNESS BURT: (

Standing by the alcohol receiving tank was a man who afterwards gave his name as Frank Ferrari. He was searched by investigator De Kalb in my presence. A key was found on him. I don't recall anything else. I identify Government's Exhibit No. 2 for identification as the exact key that was taken from him.

(Testimony of John M. Burt.)

WITNESS BURT (continuing): I am positive that this is the key taken from the defendant Ferrari and not from one of the other defendants because on January 30th of that year (1933) I marked Ferrari's initial on the key. The marking is right here, the letter "F," scratched in the metal. I had kept the keys separately until that time.

MR. GOULDEN: I ask, your Honor, that this key be placed in evidence as Government's Exhibit next in order.

MR. PERRY: I object to it on the ground that it violates the constitutional rights of the defendant Rocchia, particularly as respects the Fourth and Fifth Amendments.

THE COURT: The objection is overruled. It will be received as Government's Exhibit 4 in evidence.

MR. PERRY: Exception.

(The key was marked U. S. Exhibit 4) [117]

(EXCEPTION NO. 20)

WITNESS BURT (continuing): Our entrance into the building on January 9, 1933 was at 4:30 in the afternoon. After the first examination of the still room proper Investigator Goggin and myself left the still room and went into the forepart of the building and concealed ourselves. At six o'clock we heard a key rattling in the lock of the small door and the door opened and closed again; then there came a knocking at a little inner door which leads from the landing at the foot of the stairs into the larger outer room there in front. I am speaking of

(Testimony of John M. Burt.)

Door No. 4. Goggin and I previously had tested that door and it was locked. We also locked door No. 5. We heard the key rattle in the door and the door opened and closed and then came a knocking at this Door No. 5. We were then over in this part and we had to go all the way across here and open the door for him. It was locked and he could not get in. I opened the door and he started to step in and we immediately placed him under arrest. It was defendant Cappi. Government's Exhibit No. 3 for identification (U. S. exhibit No. 5 in evidence) is the key that was found on the person of Cappi. I retained the key in my possession. I scratched the letter "C" in the metal.

MR. GOULDEN: I ask, your Honor, that Government's Exhibit 3 for identification be placed in evidence and marked Government's Exhibit next in order.

THE COURT: Government's Exhibit No. 3 for identification will be received as Government's Exhibit 5 in evidence.

MR. PERRY: I wish at this time to make the objection as regards the constitutional rights of the defendant Rocchia.

THE COURT: Objection overruled. [118]

(EXCEPTION NO. 21)

WITNESS (Continuing): As soon as Cappi had been questioned Investigators Goggin and De Kalb left with Ferrari and Cappi to take them to the prison and book them, leaving me in the custody of

(Testimony of John M. Burt.)

the premises. I remained alone in the premises following the departure of the officers and their two prisoners until 8:10 p. m.

MR. GOULDEN: Q What happened at 8:10 p. m.?

MR. PERRY: I object to any testimony that this witness might give as to what happened at 8:10 p. m. on the ground that it will violate the constitutional rights of the defendant Rocchia, particularly as respects Amendments Four and Five to the Constitution.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A I had started for what was Door No. 5, intending to go up and look over the mezzanine floor more carefully, and I heard footsteps out in front of the premises, and saw a sort of a shadow of a man's head and shoulders passing in front. I stopped in the middle of the room. The footsteps ceased in front of the small door. I then heard again the rattle of a key in the lock and I stepped under the stairs which led up to the mezzanine floor and concealed myself. I heard the small door open and close and then Door No. 5 was opened—it was not locked at that time; it was opened and I heard a man step down into this larger room. I stepped out from under the stairs and *throw* the beam of my flashlight in his face and told him that I was a federal officer and that he was under arrest. [119]

(Testimony of John M. Burt.)

(EXCEPTION NO. 22)

WITNESS (continuing): It was dark in this room at that time. It was not dark in the distillery at that time. It was all lighted up. I then placed the man who entered the premises at that time under arrest. I did not question him at that point. Immediately following placing the man under arrest I told him to go on back and he preceded me through doors 2 and 3 into the still room. This man was Antonio Rocchia, seated at the table there; the defendant on trial. I did not question the man when I reached the still room at this time. I did not search him when I first went into the still room.

MR. GOULDEN: Did you have any conversation with the defendant Rocchia when you went into the still room? A Yes, sir. Q What was that conversation?

MR. PERRY. I object to any conversation on the ground that it would be in violation of the constitutional rights of the defendant, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A Rocchia turned to me and said, "Are you really a federal officer?" I said, "I am," and I showed him my badge. He said, "Suppose I give you $500 and you let me walk out and nobody will ever know the difference." I told him I would not

(Testimony of John M. Burt.)
take that offer. He then increased the offer to $800. I refused that offer, I told him I would have to search him, which I then did. I found a wallet with a number of papers, various papers in it, and also a quantity of currency and a purse with a certain amount of currency in it, and some bills rolled up in his pocket, and a number of various other papers, and a key. At the time I [120] stated that he offered me first $500 and then $800, that was not the most that he offered me. He increased the offer later to $1000 as I was making the search. When I was searching him he and I were alone. There was no one else present. I told him I was not interested. The exact words I do not recall, but as nearly as I can remember Rocchia said, "Suppose I make it $1000?" When I refused that he said, "Isn't that enough?" And I again told him I was not interested. By that time I had segregated the papers from the purse out of his pocket and handed the wallet and the small purse back to him. He then said, "I think I have about $1400, I am not sure how much I have, but I will give you all of it." He began to count the money out on the floor in the still room. When he completed the count he informed me there was $1600, and offered me the lot of it. Q Less $50? A The $50 was in another purse. He did not count that out in the pile.

(EXCEPTION NO. 23)

WITNESS (continuing): In looking over the papers (taken from person of Rocchia, U. S. Ex-

(Testimony of John M. Burt.)
hibits in evidence numbers 7 and 8) I saw repeatedly the name Antonio Rocchia, and I asked him if that was his name and he said it was. He had not given me any name prior to the search. I Kept possession of the papers and the key that I found on his person. Government's Exhibit 4 for identification is the key that was on the person of the defendant Rocchia. It is his key because I scratched the initial "R" in the metal.

MR. GOULDEN: I ask, your Honor, that Government's Exhibit 4 for identification be now received in evidence.

THE COURT: It will be received and marked Government's Exhibit 6 in evidence.

MR. PERRY: I object to it on the ground that it violates [121] the constitutional rights of the defendant, particularly as respects Amendments Four and Five.

THE COURT: Objection overruled.

MR. PERRY: Exception.

(The key was marked "U. S. Exhibit 6.")

(EXCEPTION NO. 24)

WITNESS (continuing): I would recognize the papers that were seized from the defendant if I saw them again.

MR. GOULDEN: I show you three documents marked Government's Exhibit 5 for identification (U. S. No. 7 in evidence) purporting to be photographs of certain papers; also seven photographs

(Testimony of John M. Burt.)
marked government's Exhibit 6 for identification (U. S. No. 8 in evidence) and ask you if you ever saw them before, or the originals from which they might be taken?

MR. PERRY: I object to the question upon the ground that it violates the defendant's constitutional rights under the Fourth and Fifth Amendments; that a petition for the exclusion of evidence and return of property was filed and an order of court was made directing the return of the personal property. I object to this on the ground that the originals are the best evidence.

THE COURT: Objection overruled.

MR. PERRY: Exception.

THE COURT: Q In other words, you are not able to describe those documents accurately, are you? A Some I can describe accurately.

Q All the way through and as to language, etc.? A I could not reproduce every word on these documents.

Q In view of that, and looking at these photographs, do they depict the documents which you removed from the defendant? [122] A Yes, sir.

MR. PERRY: To the questions your Honor just asked, may I reserve an objection to them also?

THE COURT: Objection overruled.

MR. PERRY: Exception.

(EXCEPTION NO. 25)

WITNESS (continuing): I retained possession of the papers taken from the defendant Rocchia

(Testimony of John M. Burt.)

(U. S. Exhibits 5 and 6 for iden.) until along about the first part of February, I don't recall the exact date. Investigator Hauptman in my presence made photographs of these papers, developing negatives, and made the prints. To identify these documents I wrote my initials and the date on the back of each one. Investigator Hauptman also placed his initials thereon in my presence.

MR. GOULDEN: We ask that they be received in evidence as Government's Exhibits next in order.

THE COURT: Government's Exhibits 7 and 8.

MR. PERRY: I object to their introduction upon the ground that the originals are the best evidence; upon the ground that a complaint was filed before the United States Commissioner on January 10, 1933, charging this defendant with a violation of the National Prohibition Act, signed William P. Goggin; and a petition for the exclusion and suppression of evidence and the return of property was made and an order was made for the return of the personal property, signed by Judge Kerrigan, upon the dismissal of the case, which are referred to in Defendant's Exhibit 1 for identification. I object to it upon the ground that the receipt of these documents is prejudicial to the defendant and violates his constitutional rights, particularly as respects Amendments Four and Five. In respect to the objection [123] to the introduction of the photostatic copies in evidence, as a preliminary matter I wish at this time, for the purpose of

(Testimony of John M. Burt.)

the record, to offer in evidence the documents I referred to, and particularly these documents which are now part of Defendant's Exhibit 1 for identification.

THE COURT: The order of admission will stand and the offer will be denied.

MR. PERRY: Exception.

WITNESS (continuing): Government's Exhibit No. 3 is the finger prints made by me of the defendant Rocchia on the night of January 9, 1933. This was signed by the defendant Rocchia, he placed the signature John Caruso thereon in my presence.

(EXCEPTION NO. 26)

AGENT BURT (continuing): I testified on cross-examination that Agents Goggin and De Kalb returned to the still room about 10 p. m. after they had left with the prisoners Ferrari and Cappi. I had a conversation with those agents when they returned; defendant Rocchia was present.

MR. GOULDEN: Q What conversation did you have, if any, with either of the agents Goggin or De Kalb upon their return?

MR. PERRY: For the purpose of preserving the record, I am going to make the same objection to this question, that is, the constitutional objection.

THE COURT: Objection overruled.

MR. PERRY: Exception.

A Investigator Goggin walked over in front of the defendant Rocchia, who was seated on a yeast

(Testimony of John M. Burt.)
box or on a five-gallon can and stopped in front of him and looked down and said, "Well, John, it looks as if you have the big shot." [124]

MR. GOULDEN: Q Who is John? A That is myself. Q Did you make any comment on that? A I said, "Yes, it looks as if I have, search him and see what you think."

(EXCEPTION No. 27)

WITNESS BURT (continuing):

MR. GOULDEN: Was there any further conversation either between yourself and the defendant or between yourself and the two agents with you in the presence of the defendant? A After the money had been counted and returned to the defendant Investigator Goggin turned to me and said——

MR. PERRY: Now, just a moment. I am sorry to interrupt but I think probably the line of answer would be along the line of the other testimony, and I wish to make this objection, that any statement that Goggin might make in the presence of this defendant is purely self-serving as far as the agents, themselves, are concerned. In fact, they could make any statement they pleased in the presence of any defendant, including this defendant, and then could take the stand and say they said such and such in front of a certain defendant, whereas as a matter of fact it is not binding upon the defendant at all, it is purely self-serving.

(Testimony of John M. Burt.)

MR. GOULDEN: The purpose of the question is to develop what the defendant did under the circumstances.

THE COURT: I will allow the question.

MR. PERRY: Exception.

A Investigator Goggin said, "Didn't he try to pay off?" And I said, "Yes, he did."

MR. GOULDEN: Q Did the defendant say anything to that? A He did not.

Q Was there any further conversation? A He was then ques- [125] tioned——in the presence of all of us and stated that he had been approached by a strange man down on Third street who had given him the key and told him if he would go up to 60 Brady street he might find some work, that he knew nothing about the still or its ownership. At that point he refused to answer any further questions. [126]

(EXCEPTION NO. 28)

TESTIMONY OF SAM McKEE, for the government.

SAM McKEE, called for the United States, being duly sworn, testified as follows:

I am in the real estate and insurance business at 2812 Mission street and have been in that business for twenty years. In the latter part of the year 1932 I had in my employ a man by the name of William Elligeroth. He acted as a real estate salesman, submitting properties and posting signs. I recognize Government's Exhibit

(Testimony of Sam McKee.)

8 for identification, dated the 10th day of November, 1932, being a lease between A. L. Thulin and Joseph Rossi. I was present when the lessor, Mr. Thulin, signed it. I was not present when Joseph Rossi signed it. I believe the name Joseph Rossi was on the lease at the time I saw it. I called on Mr. Thulin with my salesman, Mr. Elligeroth, and suggested that he lease the place under the conditions that were submitted to us. It was to be leased for a draying and express business. The place was unoccupied at the time and Mr. Thulin agreed to lease it under these conditions. After Mr. Thulin signed the lease I took it back. I left one copy with Mr. Thulin. We always have two or three copies. We have an owner's copy and a tenant's copy. This is the owner's copy; the copy I left with Mr. Thulin. I am familiar with the signature of Mr. Elligeroth. I would say that that was his signature as a witness on that lease.

CROSS EXAMINATION

WITNESS: I do not know the defendant Rocchia. I am not able to identify the defendant Rocchia. I don't think I have ever seen him before. He is not the man who was introduced [127] to me prior to the time the lease was signed and when the lease was being negotiated.

TESTIMONY OF AXEL L. THULIN, for the government.

AXEL L. THULIN, called for the United States, being duly sworn, testified as follows:

WITNESS: I reside at 656 16th Avenue, San Francisco. I am a general contractor. I own the premises at 60 Brady street, in the City and County of San Francisco. On or about November 10, 1932, I signed a lease of those premises. A salesman in Mr. McKee's office made the arrangements for the lease. At the time the lease was presented to me I am almost sure that it was signed by the proposed lessee. This is my signature on Government's Exhibit 8 for identification. (Later received as U. S. Exhibit #13 in evidence) I kept the lease in my possession following the signing of it. I signed two of them. I had it in my safe the day I handed it over to the prohibition agents. This was subsequent to the seizure of the still. I did not visit the premises at any time following November 10th when it was leased to whoever these parties were. I visited the premises on January 9, 1933, following the raid. I noticed that a *partitition* had been put in. There were no structural changes except some broken glass in the skylight. A skylight or two was raised. I refer to the partition parallel with the front of the building and about thirty feet back. That is the wall marked 6 on government's exhibit No. 1 in evidence.

CROSS EXAMINATION

WITNESS: I never have seen the defendant Rocchia before today.

TESTIMONY OF HAROLD VON HUSEN, for the government.

HAROLD VON HUSEN, called for the United States, being duly [128] sworn, testified as follows:

WITNESS: I reside at 950 Pine street. I am an inspector in the San Francisco Water Department, and have been so employed for about twelve years. For three weeks in a month I am engaged in reading water meters, and the rest of the month I do inspection work. On January 4, 1933 I was at 60 Brady street, in San Francisco. I was reading water meters on Brady street. I found there was a very large delivery of water at 60 Brady street and that the meter was running wide open. I knocked on the door at the office and got no response. I looked inside but could see no one because of all the partitions there. I went to the garage door, the folding door, and pounded on that with my hook, but got no response. Then I went back to the meter and took another check on it and it was still running. I decided that the pipe must be broken in the building. I noticed there was a house valve in the meter box, which I shut off, and I left a note and put it under this door. I don't recall the exact time but I put the time on the letter.

MR. GOULDEN: Q I show you Government's Exhibit 8 (in evidence) and ask you if that is a true photo or copy of the note you left under the door?

MR. PERRY: I am going to object to the question upon the ground that any testimony which this witness might give with respect to Government's

(Testimony of Harold Von Husen.)

Exhibit 8 will violate the constitutional rights of the defendant on trial, particularly as respects amendments Four and Five. I repeat for the purpose of the record that a complaint was filed before the Commissioner charging the defendant with violating the National Prohibition Act in January of 1933 for the same offense for which he is being charged here now, arising out of the same transaction, and that a motion to [129] suppress was filed, and that the matter was dismissed, I mean the case was dismissed as to Rocchia; that an order in the District Court was signed ordering the return of all papers, and that those documents are contained in Defendant's Exhibit 1 for identification. The document that the witness now refers to is a photostatic copy, as I understand it from previous testimony, of certain papers that were taken from the defendant Rocchia's person.

THE COURT: The objection is overruled.

MR. PERRY: Exception.

A That is a true copy.

MR. GOULDEN: May I read this in evidence, your Honor?

THE COURT: You may.

MR. GOULDEN: "I have shut off your water at valve in water box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and *called* at office 425 Mason street.

(Testimony of Harold Von Husen.)
Von Husen, Inspector S. F. Water Department. 1/4/33 1:30 p.m." No further questions.

CROSS EXAMINATION

WITNESS: I never have seen the defendant, Mr. Rocchia, before.

(EXCEPTION NO. 29)

TESTIMONY OF ERNEST E. WILLIAMS, for the government.

ERNEST E. WILLIAMS, called for the United States, being sworn, testified as follows:

WITNESS: I am United States *Commission* for this District at San Francisco. I was such on January 10, 1933. On that day I had a complaint No. 3142 filed before me charging Frank Ferrari and Silvio Cappi and John Caruso with conspiracy and manufacture. That complaint is now on file with the Clerk [130] of the United States District Court, here. Looking at Defendant's Exhibit 1 for identification, I identify this as the complaint you are speaking about. Said Exhibit reading as follows:

"THE UNITED STATES OF AMERICA

No.—— District of Calif, ss.

THE UNITED STATES

vs.

FRANK FERRARI, SILVIO CAPPI and
JOHN CARUSO

COMPLAINT FOR VIOLATION OF SECTION NPA R. S.

Before me, the undersigned, a U. S. Commissioner for the No. Dist. of Calif., personally appeared this day Wm. P. Goggin, who, on oath, deposes and says that above Defendants, on or about the 9 day of Jan, 1933, at 60 Brady St. - S. F. in the north. District of Calif., did unlawfully,

Count 1. Conspire among themselves to violate the N. P. A., and in pursuance to said act said defendants did on above date possess a still; ~~and manufacture alcohol~~.

(E. E. W.) Count 1. manufacture alcohol contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe and does believe that——————————————are material witnesses to the subject-matter of this complaint.

WM. P. GOGGIN

Subscribed and sworn to before me this 10 day of Jan., 1933

(Seal) ERNEST E. WILLIAMS
U. S. Commissioner

WITNESS (continuing): There was a hearing on this complaint. I am of the opinion that there was a motion to suppress filed [131] before me. I have not the papers. They are in the clerk's office.

(Testimony of Ernest E. Williams.)
I would have to have the file to be able to say that there was a Motion to Suppress filed on behalf of the defendants in this case, particularly the defendant Caruso. I am of the opinion that there was. I have nothing in my docket to show it. My records show what the disposition of the case was by me; on January 28, 1932 I held the defendant Ferrari and I dismissed the other defendants, towit, Cappi and Caruso. I have in my docket that Mr. Abrams, who represented the Government at that time, consented to the dismissal of Caruso and Cappi. I have forgotten whether I decided a motion to suppress, but I would assume that I dismissed it upon the suggestion of Mr. Abrams, or, rather, dismissed them. I cannot say there was no motion to suppress presented to me. I have forgotten about that. I would say they were dismissed because Mr. Abrams moved to dismiss. I follow the policy of the United States Attorney, that is, if he suggests a dismissal I accept the suggestion. I would say there was no ruling by me on any motion to suppress so far as the defendant Caruso is concerned. I do not feel certain of my statement when I say that was my course of conduct in that case because I have had so many cases; I merely have in my docket that Abrams consented to the dismissal of Cappi and Caruso, which would indicate to me clearly that is the reason I dismissed them. I recollect signing an affidavit in which I set forth that I had not passed upon that matter. I signed a document entitled "Affidavit of Ernest E. Williams, United States Commissioner,"

(Testimony of Ernest E. Williams.)
Filed February 1, 1934, with the Clerk's office. I have read the affidavit and it is correct. The affidavit is to the effect that the motions to suppress were presented but no ruling was had upon them, at all. [132]

CROSS EXAMINATION

WITNESS: This affidavit was sworn to by me on January 6, 1934. I don't know when the petition to suppress was filed. (Defendant's Exhibit No. 1 for identification) I have no record of that in my docket. I have no place there for such notation. The arrest took place on January 9, 1933, and the transcript of testimony taken on January 25, 1933 was taken before me as United States Commissioner. The matter was presented before me on January 25, 1933 and the *fuling* was made on January 28, 1933. On direct testimony I think I stated that my records would indicate there was no ruling on the motion to suppress because I have a notation here that Abrams the Assistant U. S. Attorney consented to the dismissal of Caruso and Cappi. There could have been a ruling on the motion to suppress by me even though the United States Attorney consented to their dismissal, but it would have been unnecessary. I would have indicated it had I made a ruling. I would have disposed of the entire matter so far as those particular issues were concerned, either by making a holding or a dismissal. The complaint before me now (Government's Exhibit 10 in evidence) does not charge a violation of any Internal

(Testimony of Ernest E. Williams.)

Revenue Act. It only charges a violation of the National Prohibition Act. Conspiracy in the first count and the second count is manufacturing alcohol. It is a complaint for violating the National Prohibition Act. I have independent recollection that this petition to suppress (Defendant's Exhibit No. 1 for identification) was filed before me; I am confident that it was.

MR. PERRY: I now offer the petition to suppress and to exclude evidence in evidence. (Defendant's Exhibit 1 for identification)

THE COURT: We have testimony here that that was never [133] acted upon and consequently it would not be a part of this case, so far as the Commissioner's testimony goes. The fact that it was filed in the case has no bearing here unless it was acted upon. Nobody has testified to that effect. It is part of Exhibit 1 for identification.

MR. PERRY: I will take an exception to your Honor's ruling. I offer at the same time again the order for the return of the property, signed by Judge Kerrigan in the same proceeding which is a part also of Defendant's Exhibit 1 for identification; I offer that in evidence.

THE COURT: The same ruling.

MR. PERRY: Exception.

RE DIRECT EXAMINATION

WITNESS WILLIAMS (continuing): It was my practice on violations of the law relating to the manufacture of liquor to charge it under the Na-

(Testimony of Ernest E. Williams.)
tional Prohibition Act during the time the National Prohibition Act was in effect. It is correct that there was a violation of the Revised Statutes as well as the National Prohibition Act. The notation N. P. A. was placed there by myself. No mention of the N. P. A. was made by the prohibition agents. "R. S." in the heading of the complaint stands for Revised Statutes. The internal Revenue Statutes are a part of the Revised Statutes.

THE COURT: The indictment here is presented by the grand jury. The offense for which the defendant is on trial is the offense set forth in these two indictments. The grand jury is not limited in his findings and holdings by the action of the Commissioner. The Commissioner simply holds the defendant over. The jury is only interested in the grand jury's action and the evidence which is received in this case. I don't think we have to go into these collateral matters. [134]

(EXCEPTION NO. 30)

TESTIMONY OF EMIL J. CANEPA, for the Government.

EMIL J. CANEPA, called for the United States, being duly sworn, testified as follows:

WITNESS: My name is Emil J. Canepa. I am a United States Deputy Marshal. I have been employed in that capacity for the last twelve years. I have acted as Italian Interpreter, both in court and out of court. I speak and write Italian. The

(Testimony of Emil J. Canepa.)
notation on the third sheet of U. S. Exhibit 7 which I now hold in my hand is in the Italian language. I have made a true and correct translation of that into the English language and the document which you now hand me is that true and correct translation. It is a complete translation with the exception of one thing, the "Fran." It appears here "dato al Fran $40.00." It should be either "Frank" or it could be "Franchesca." It would be either an abbreviation for Frank or Franchesca." When I say "Frank" I do not mean a French coin or someone is frank and free. I mean the name of a person. At the bottom of the document is the word "Bal." with something following it; it is not clear. I can't make it out. I can't tell what it is. In this translation I have listed in columns as it is on the original the language used and to the right of that language I have placed the English translation.

MR. GOULDEN: I offer this translation in evidence and ask that it be marked Government's Exhibit next in order.

MR. PERRY: I object to it on the ground that it would have a tendency to and would violate the constitutional rights of this defendant, particularly as respects the Fourth and Fifth Amendments.

THE COURT: Objection overruled. It will be received as [135] Government's Exhibit 11 in evidence.

MR. PERRY: Exception.

(Testimony of Emil J. Canepa.)

Said Exhibit 11 in evidence reads as follows:

"Zucchero	$277.10	—Sugar $277.10
Yeast	55.00	
Zucchero	$277.10	—Sugar $277.10
Yeast	55.00	
Zucchero	$277.10	—Sugar $277.10
Yeast	55.00	
Zucchero	$295.90	—Sugar $295.90
Yeast	55.00	
Zucchero	$295.90	—Sugar $295.90
Yeast	55.00	
	2104.00	
	592.20	
	2707.20	
Rendita	$150.00	—Rent $150.00
Carabinieri	300.00	—Police $300.00
Canne	20.00	—Cans $20.80
DATO al Fran	$40.00	—Gave to Frank $40.00
Pagato Truck	$35.20	—Paid Truck $35.20
Agua	$4.10	—Water $4.10
Canne	$15.60	—Cans $15.60
Tubs	$2.50	—Tubs $2.50
Dato Al Carp.	$25.00	—Gave to Carpenter $25.00
	$593.20	
		Bal. ———

January 5, $163 " [136]

CROSS EXAMINATION

WITNESS CANEPA (continuing): There are several Italian dialects. I speak two or three of them, Genovese, Piemontese and Lucchese. I speak

(Testimony of Emil J. Canepa.)
primarily the Genovese dialect. There is nothing in the Exhibit I translated that I do not understand. It is in my own dialect.

(EXCEPTION NO. 31)

TESTIMONY OF GEORGE W. POULTNEY, for the Government.

GEORGE W. POULTNEY, called for the United States, being duly sworn, testified as follows:

WITNESS: I represent the New Amsterdam Casualty Company, and have for some time past, and did on November 25, 1933. On that date I wrote a New Amsterdam Casualty Company bond for Antonio Rocchia in the sum of $2500 in case No. 24941, entitled In the United States District Court for this District, United States v. A. Rocchia. Mr. Rocchia signed that bond in my presence.

MR. PERRY: I concede that is his (Rocchia's) signature.

WITNESS: I know the defendant Antonio Rocchia. He is sitting there at the defense counsel's table.

THE COURT: Let the record show that the witness has identified the defendant Antonio Rocchia on trial.

MR. GOULDEN: I offer the bond in evidence as Government's Exhibit next in order for the purpose of being used as an exemplar.

THE COURT: It will be received as Government's Exhibit 12.

TESTIMONY OF EDWARD O. HEINRICH, for the government.

EDWARD O. HEINRICH, called for the United States, being [137] duly sworn, testified as follows:

WITNESS: I reside in Berkeley, California. I am an examiner of suspected and disputed writings and practice as a consulting criminologist in the field of physics and chemistry.

MR. PERRY: In the interest of time I am willing to stipulate to the qualifications of the witness to testify. I will stipulate that he is qualified to testify as an expert on handwriting and fingerprints.

WITNESS (continuing) Certain documents have been given to me in this case for my consideration and study. I am prepared to give my expert opinion as to the authorship of the handwriting contained in the documents I examined. I have seen government's Exhibit No. 12 purporting to be the bond in this case, government's Exhibit No. 3 (in evidence) being a finger print card of John Caruso, government's Exhibit No. 7 for identification, (Exhibit No. 14 in evidence) being a finger print card signed Antonio Rocchia dated October 11, 1930, and government's Exhibit No. 8 for identification, (Ex. No. 13 in evidence) a lease between A. L. Thulin and Joseph Rossi, and portions of Exhibit 7. I have examined the handwriting on each of these cards. Referring specifically to Government's Exhibit No. 8 for identification (U. S. Exhibit No. 13 in evidence) which is the lease, I

(Testimony of Edward O. Heinrich.)
have examined the signature of Joseph Rossi that appears upon that document. Also Government's Exhibit No. 12, (in evidence) the bond, I have examined the signature of Antonio Rocchia on that. Also Government's Exhibit No. 3 (in evidence) the finger print card containing the signature John Caruso; I examined the signature John Caruso and the finger prints on that document; also in connection with that latter document, Government Exhibit 3, I examined the finger prints. On Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence) being a [138] finger print card and signed Antonio Rocchia and dated October 1, 1930, I examined the signature Antonio Rocchia on that document, as well as the finger prints on that document. Another portion of U. S. Exhibit No. 7 in evidence, being a list of words and figures in two columns, I examined the handwriting of that portion of that exhibit. The handwriting on Government's Exhibit No. 3 (in evidence), as indicated by the signature John Caruso, was made by the same man who made the signature Antonio Rocchia appearing on the bond, Government's Exhibit No. 12 (in evidence). In my opinion both signatures or writings which have been drawn to my attention by the Assistant United States Attorney are, in my opinion, the writing of the same individual. They include the signatures John Caruso on Government's Exhibit No. 3 (in evidence), Antonio Rocchia, on the bond, Government's Exhibit No. 12 (in evidence), and the name Joseph Rossi on Government's

(Testimony of Edward O. Heinrich.)
Exhibit No. 8 for identification, the lease (U. S. Exhibit No. 13 in evidence), and the name Antonio Rocchia on Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence), and also the handwriting that is in Italian on Government's Exhibit No. 7; in evidence.

MR. GOULDEN: Q You have examined the finger print on the card, Government's Exhibit No. 3, (in evidence) have you, John Caruso? A Yes. Q Have you also examined the finger print on the card Government's Exhibit No. 7 for identification, (U. S. Exhibit No. 14 in evidence) Antonio Rocchia? A Yes. Q Are you prepared to say whether or not the finger prints are of the same man? A I am——

MR. PERRY: Just one moment, please. I am going to make an objection now, and I will make an objection later on; I am going to object to the further use of the finger prints. As I understood it, when these documents were introduced in evidence [139] first the only use of the documents was for the purpose of the handwriting. Now counsel for the Government endeavors to use by way of comparison the finger prints on those two cards, and by those two cards I mean Government's Exhibit No. 3 in evidence and Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence). I mention this at this time, your Honor, because they are trying to introduce or show prior transactions that this defendant may have had in other matters and to bring it in in this manner, and

(Testimony of Edward O. Heinrich.)
which could not have been brought into this court in any other way. In other words, by a subterfuge they are bringing in under the guise of the handwriting matter something to use against this defendant. I object to it on that ground and as a matter of principle.

THE COURT: It is certainly pertinent evidence and I will overrule the objection. Let us proceed with the examination.

MR. PERRY: Exception.

(EXCEPTION NO. 32)

MR. GOULDEN: Q Would you say at this time in your expert opinion that the finger prints on the two cards (U. S. Exhibit No. 3 in evidence and U. S. Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence),) are one and the same man?

MR. PERRY: I object to it on the ground that the use of these documents is prejudicial so far as the defendant Rocchia [140] is concerned, and I assign the examination and the use of those documents with respect to finger prints by the United States Attorney as misconduct, and I ask your Honor to instruct the jury to disregard it.

THE COURT: The objection will be overruled.

MR. PERRY: Exception.

A They are the finger prints of one and the same individual.

(Government's Exhibit No. 8 for identification, the lease, was introduced in evidence and marked U. S. Exhibit 13.)

(Testimony of Edward O. Heinrich.)

(EXCEPTION NO. 33)

CROSS EXAMINATION

WITNESS HEINRICH: In comparing the signature Joseph Rossi on Government's Exhibit No. 13 in evidence with any documents or exemplars I may have had, the basis of my comparison was not only the signature Rocchia. I had other signatures but they were the signatures of Rocchia. With the exception of government's exhibit 7 in evidence there was no other writing than signatures.

Q Was Exhibit 7 used as an exemplar, or was it used for the purpose of determining whether or not Rocchia's writing was on that document?

A Primarily, it was identified as being probably in Rocchia's handwriting. From the signatures I identified it as his handwriting, and therefore used it to some extent as a guide in considering the other evidence.

THE COURT: As I understand it, you were not interested *in* alone in taking a signature that somebody told you was Rocchia's but you compared all these writings to establish in your mind that the same individual, whoever he might be, actually wrote these various writings? A That is the way the problem was [141] handled. That was the real problem so far as I was concerned. I don't know Mr. Rocchia. I never saw him write. Consequently it is by other testimony that someone must establish that some of those signatures are his signatures.

(Testimony of Edward O. Heinrich.)
The foundation of the examination was a signature. I did not have any other writings as the foundation or basis for my expert opinion. It was only told to me that that might be Rocchia's handwriting on Government's Exhibit 7 in evidence. When they submitted all these documents they were variously described. U. S. Exhibit No. 7 was described as an exemplar with a reservation that it had not been fully identified; that is the way it was presented to me. I included it in one of my exemplars with that reservation until after I had established my basis on the comparison of signatures, and thereafter I considered it with relation to the signature.

Q In other words, you could take any one of those writings as an exemplar and by comparing it with the other writings you would be of the opinion that all the writings were by the same person; is not that correct, or have you a doubt as to any of those writings?

A No, I have no doubt as to any of the writings but if the exemplars are withdrawn one by one until I am reduced to just the bond, which is Exhibit No. 12 (in evidence), and the lease, which is Exhibit No. 13 (in evidence), I would have to qualify my answer somewhat, but having before me Government's Exhibit 7 for identification (U. S. Exhibit No. 14 in evidence) bearing the signature Antonio Rocchia and the bond (U. S. Exhibit No. 12 in evidence) bearing the signature Antonio Rocchia, and Government's Exhibit No. 3 (in evidence) bearing the signature John Caruso, there is

(Testimony of Edward O. Heinrich.)
enough material in those four signatures to positively establish the identification, and from that to proceed to any other writing by the same person. [142]

MR. PERRY Q Taking Government's Exhibit No. 13 in evidence, what are the dissimilar features to all the exemplars, taking each word?

A When you include the exemplars as a group the dissimilarities are reduced *partically* to zero. If you select, for instance, that which seems to be farthest away, the bond, Government's Exhibit No. 13, and the signature Joseph Rossi on Government's Exhibit 12, then we are comparing writing which differs in size and differs in the presence of certain letters. Joseph Rossi and Antonio Rocchia have in common only the letter "o" and the letter "i." In the case of Government's Exhibit No. 12 the erroneous writing of "c" following "o" in the name Rossi—it is written "R-o-c," and a correction appearing therein correcting it and concluding it as Rossi. The name as it was written was begun, "R-o-c," exactly as it is in Rocchia. Those are the similar features. As to the dissimilar features the presence in the name Joseph Rossi, the "J," the small letter "s" and the small letter "e." The small letter "h" occurs in Joseph and in Rocchia as a common feature. I have enumerated them in so far as these letters occur which are common to the two names. They are not dissimilar in their construction or their formation, their slope or their style; they are dissimilar only in size. They retain, in spite of

(Testimony of Edward O. Heinrich.)
the difference in size, the same proportion and the same procedure in their production. The dissimilarities, if we may call them dissimilarities, are only those dissimilarities which involve the presence of other letters—letters which are not common to the two names.

MR. GOULDEN: I neglected or I overlooked requesting that Government's Exhibit No. 7 for identification be admitted in evi- [143] dence. Professor Heinrich identified it, that being the finger print card with the signature Antonio Rocchia upon it.

THE COURT: Then this will be received as U. S. Exhibit 14 in evidence.

MR. PERRY: I object to it as immaterial, irrelevant, and incompetent, and upon the ground that it is prejudicial to the rights and interests of my client to introduce this document in evidence bearing his purported finger prints and his signature; it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth amendments.

THE COURT: Ruling will stand.

MR. PERRY: Exception.

(EXCEPTION NO. 34)

MR. GOULDEN: The Government rests.

MR. PERRY: The defendant rests, we have no evidence to present. I would like to make certain motions to your Honor.

THE COURT: Proceed with the motions, Mr. Perry, prior to argument.

MR. PERRY: I wish at this time to make a motion for a directed verdict. The motion for directed verdict goes first to indictment No. 24941-L. The grounds of my motion are as follows:

That the facts and allegations set forth in indictment No. 24941 do not constitute an offense against the laws of the United States because the allegations contained in counts 1, 2, 3, 4, 5, 6, and 7, and each of them, and with respect to them separately and severally, do not constitute an offense against the laws of the United States.

Furthermore, on the ground that because in the trial of the [144] case the evidence adduced on all counts and on each count, separately and severally, of indictment No. 24941-L, showed that the discovery of the commission of the crime, if any, was secured by unlawful search and seizure, and in violation of the rights guaranteed to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States, by reason whereof this Court has no jurisdiction to hear and determine said cause, or any part thereof.

On the further ground because the indictment in each count, separately and severally, is vague, uncertain, and indefinite, and does not sufficiently state or aver or set forth the alleged offense charged in said counts and each of them against said defendant, or the acts or facts constituting the same

so as to apprise said defendant of the crime or the offense with which he therein stands charged.

On the further ground because the evidence introduced as to indictment No. 24941-L, and as to each count of said indictment, separately and severally, was insufficient to support a charge under the indictment.

Furthermore, because of error in admitting evidence as to any offense under indictment 24941-L, as to each count thereof, separately and severally.

Further, upon the ground that there was admitted incompetent evidence offered by the United States.

Further, that the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

As a further ground, the misconduct of the United States Attorney, which was duly and regularly assigned during the course of the trial and exceptions to which were taken. [145]

THE COURT: The motion will be denied.

MR. PERRY: Exception to the denial of the motion for a directed verdict.

(EXCEPTION NO. 35)

Thereupon the matter was argued to the jury by respective counsel and the jury was instructed by the court as follows:

CHARGE TO THE JURY.

THE COURT (Orally): You are here, gentlemen of the jury, for the purpose of trying the

issues of fact that are presented by the allegations in the indictment herein returned by the federal grand jury of this division and district, and filed in this court, and the defendant's plea thereto.

The indictment herein is, and is to be considered, as a mere charge or accusation against the defendant, and is not, of itself, any evidence of the defendant's guilt, and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of such indictment, and/or the arrest of a defendant under such indictments.

The duty of trying the issues of fact herein you should perform uninfluenced by pity for the defendant, or by passion or prejudice on account of the nature of the charge against him; nor should you reach a verdict based upon mere suspicion. You are to be governed solely by the evidence introduced in this trial, and the law as given you by this Court.

The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice. A verdict founded upon sentiment or pity for the accused, or upon public opinion or public feeling, or upon passion or prejudice, or upon conjecture, would be a false verdict. You will not [146] take counsel of them in deliberating upon your verdict.

In determining the issues of fact herein, the matter of the penalty prescribed by law for the punishment of the offense involved should form no part of your deliberations, and should you be aware

of any such penalty it is your duty to disregard such knowledge; in other words, it is your sole duty to decide whether the defendant is guilty or not guilty of what he is charged within the indictment herein. The question of punishment is left wholly to the Court, except as the law circumscribes its power.

The Court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, as to what facts have been proved. And if there is a variance between the two you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments are not evidence in the case.

If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

If counsel, however, has stipulated or agreed to certain facts, you are to regard the facts as stipulated to as being conclusively proven.

It sometimes happens during the trial of a case that objections are made to questions asked, or to offers made to prove certain facts, which objections are sustained by the Court; and it sometimes happens that evidence given by a witness is stricken out by the Court on motion. In any of such cases you are [147] instructed that in arriving at a verdict

you are not to consider as evidence anything that has been stricken out by the Court, or anything offered to be proven or contained in any question to which an objection has been sustained by the Court.

The Court charges you that evidence admitted for a limited purpose is to be considered by the jury for such purpose, and none other. Under this rule, it is the duty of the jury, when the propositions of fact to which such evidence is addressed are determined, to exclude such evidence from their minds as to all other matters of fact in the case.

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them, and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any; or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony; or by evidence affecting his character for truth, honesty, or integrity; or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness false in one of his or her testimony is to be distrusted in others, that is to say, the

jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury being con- [148] vinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal.

Reasonable doubt is not mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than

the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. [149] While the defendant cannot be convicted unless his guilt is established beyond a reasonable doubt, still the law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

The jury are not bound to decide in conformity with the declarations of any number of witnesses who do not produce conviction in their minds against a less number or against a presumption or other evidence satisfying their minds.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime, and the other is proof in testimony of a chain of circumstances pointing sufficiently strong to the commisson of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of statements by defendants, plans laid for the commission of the crime; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of cir-

cumstantial evidence that renders it less reliable than the other class of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow.

If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective [150] of whether such certainty has been produced by direct evidence, or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

The defendant is entitled, if he so elects, to rest the issues of the case upon the testimony presented by the prosecution, without offering any evidence in his defense. A defendant is not required to take the witness stand to establish his innocence, and no presumption or inference should be indulged in against a defendant because of his failure to take the stand and testify.

I charge you that in order to convict this defendant the facts proven must be consistent with the hypothesis of his guilt, and inconsistent with the hypothesis of his innocence. I further instruct you that any such hypothesis must not only be rational, that is, based upon reason, but founded upon and limited within the evidence presented in the case,

and not upon any guess or groundless surmise, nor mere conjecture or idle supposition, irrespective of such evidence.

The jury is instructed that the opinion of a handwriting expert is subject to the same general rules applicable to the testimony of other witnesses in determining the weight to be given his testimony. You should consider in this behalf the bias and interest of the expert, the fact that he is being paid to testify by the party producing him, in this case by the United States of America. You are not bound to accept or follow the testimony of an expert witness. The evidence of handwriting experts is not binding upon you, but it is received as advisory [151] only. You are therefore permitted to regard such evidence as advisory only and reckon with it in the light and experience of human affairs and accept it or reject it in whole or in part as you see fit.

I might state in that connection, gentlemen, that there were a number of exhibits which were placed in evidence which were not displayed to the jury. I do not know why that was not done, or whether it was just an oversight. In determining the issues in this case, if you desire to see them yourselves and view these exhibits I suggest that you ask for them when you go to your deliberations if you want to view them.

The first indictment involving seven counts is one that is predicated upon the Internal Revenue Acts passed for the purpose of obtaining government regulation and also obtaining revenue for the Gov-

ernment. The suggestion regarding this issue has been presented in a sort of an argumentative way, and I notice that I had to go out of my way, on account of the unusual argument of the counsel to find out just what he meant, and whether he conceded that the law of the United States has been violated. Of course, you could hardly follow the Christian doctrine of "Go and sin no more," because no man would be convicted of any offense if you had that in mind. You have taken an oath to follow the laws of the United States and to determine the facts under the instructions which are being given to you. The question is, Did this defendant violate the law of the land? In passing I would say this: Of course, the Revenue Act, which is involved here in the first six counts of this indictment, is an Act that was on the statute books long before prohibition was considered in a legislative way by the Federal Government. At the time of the enactment of the Prohibition Law it was thought [152] that possibly the Prohibition Act had in some way impaired the force or effect of these statutes, and they were re-enacted, as it were, at the same time and in association with the Prohibition Act. But it was the same law that existed before. To-day it stands, although the Prohibition Laws have passed away and cease to be of effect or moment in the law of the land. It is a regulation of distilleries with the idea of deriving revenue from that regulation, as well as conserving or controlling that activity.

The first count of Indictment No. 24941 in substance charges that on or about the 9th day of

January 1933, the defendant had in his possession an unregistered still set up, in violation of the Revised Statutes, Section 3258, which, in general, provides that every person having in his possession or custody, or under his control, any still set up which has not been properly registered with the Collector of the District is guilty of an offense.

I wish to state in general regarding these six charges representing the first six counts of this indictment that the rule of the Government is, regarding registration of these other factors, that such fact of registry is peculiarly within the knowledge of a defendant, and if in truth and in fact he has a registered still, one authorized by the Government and regulated under the rules of the Government, he would be in a position to show that to the jury in his defense. Therefore, the burden is placed upon the defendant in a case where there are these requirements, as to whether he has given notice, or whether he has been issued a bond, etc., to show, if he desired in his defense to contend that it was a registered still following the law, and consequently there could have been no criminal action taken [153] against him.

The second count in substance charges that on or about the same day the defendant was engaged in the business of a distiller of alcohol without first having given the required notice, in violation of the Revised statutes, Section 3259, which in general provides that every person engaged in or intending to be engaged in the business of a distiller, and who fails to give notice in writing to the Collector of

the District stating his name and residence, and if a company or firm the name and residence of each member thereof, as well as other required statistical data, shall be guilty of an offense.

The instruction which I just gave pertains to all these; in other words, you might sum it up this way, that a defendant who has not registered a still in conformity with the law with the Collector of Internal Revenue for the District, or who has not obtained a permit for a distillery, it is incumbent upon him if his defense is that he has taken those various steps, to make that showing.

The third count, in substance, charges that on or about the same day the defendant commenced the business of a distiller of alcohol and wilfully failed to give a bond, in violation of Revised Statutes 3260, which, in general, provides that every person intending to commence or to continue the business of a distiller, and who before proceeding with such business fails to file a bond conditioned that he shall faithfully comply with all provisions of the law relating to the business of distillers is guilty of an offense.

The fourth count charges that on or about the same day the defendant engaged in the business of a distiller of alcohol with intent to defraud the United States of the tax on distilled [154] spirits, in violation of Revised Statutes, Section 3281, which in general provides that every person who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him is guilty of an offense.

In this case the testimony has been that this alcohol was found and there were no revenue stamps upon it and no evidence was produced to show that any payment was ever made upon the alcohol which was seized by the agents in this case.

The fifth count charges in substance that on or about the same day the defendant made and fermented mash fit for distillation and the production of alcohol other than in a duly authorized distillery, in violation of Revised Statutes 3282, which, in general, provides that every person who shall make or ferment mash, wort, or wash fit for distillation, or for the production of the spirits of alcohol, in any building or on any premises other than a distillery authorized by law, is guilty of an offense.

The sixth count, in substance, charges that on or about the same day the defendant, not being an authorized distiller, knowingly *spearated* by distillation alcoholic spirits from fermented mash, in violation of the Revised Statutes, Section 3282, already mentioned, which also in general provides that any person other than an authorized distiller who shall, by distillation or by any other process, separate alcoholic spirits from fermented mash, wort or wash is guilty of an offense.

The seventh count in this indictment charges conspiracy; in other words, under the United States Laws it is not only an offense to commit those things which are prohibited by law but it is an offense to conspire to defeat those laws. It is a [155] separate and distinct offense with a separate and distinct punishment. I might state that in the production

of evidence here I think it is possible, although I have not reviewed the record, that the Court indicated that it was incumbent upon the defendant to produce certain documents which had been returned to him if application was made by the Government for their production. That is the civil law but not the criminal law. If I did so state in the record I erred. I want you to understand that the defendant is not compelled to produce anything against himself, even if demand is made upon him in a criminal action. In your consideration bear that in mind, that the defendant is not required or expected, nor can you assume anything against him because he has not produced, if he has them—there is nothing to establish that he has them at the present time—any documents which might have been desired by the Government to be produced, if they did so desire to have them produced.

The seventh count of this indictment is brought under Section 37 of the Criminal Code, which reads: If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished, if convicted, as in the statute provided. This defendant is not charged in this count of the indictment with a violation of any of the revenue acts or prohibition acts, or any other acts as far as the substantive law is concerned; the specific charge against him is that he entered into an agreement to do those things

specified in there with others, and that in furtherance of that agreement one or more of those who were in the conspiracy performed some of the acts for the pur- [156] pose of accomplishing it. The first essential inquiry for your consideration is whether there *esisted* the offense charged, since if a conspiracy has not been shown the defendant must be acquitted, no matter what acts he may have committed to violate the National Prohibition Act or the Revenue Act, or any other law which is involved in this particular issue.

If you find there was a conspiracy you will then determine whether or not the defendant on trial was a party thereto. If you find there was such conspiracy and the defendant was a party thereto you will then determine whether or not some of the overt acts alleged were committed by some party to the conspiracy. An overt act is any act such as those alleged in this indictment, done by one or more of the parties to the conspiracy to effect its object. The term "overt act" simply means an open, positive acts susceptible of proof. The overt acts set forth here in the indictment are as follows: There are three overt acts:

"(1) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia visited the realty firm of Sam McKee & Company, 2812 Mission Street, in the City and County of San Francisco, State of California, and negotiated for a lease of the premises located at No. 60 Brady Street, in the City and County of San Francisco, State of California;

"(2) That on or about the 8th day of November, 1932, the defendant Antonio Rocchia in company with an employee of the realty firm of Sam McKee & Company visited those certain premises located at No. 60 Brady Street, San Francisco, California;

"(3) That on or about the 10th day of November, 1932, the defendant Antonio Rocchia, executed, under the name of Joseph Rossi, lessor, a lease in writing for the premises at No. 60 Brady Street, City and County of San Francisco, State of California, [157] for the period of one year, with the owner, A. L. Thulin, in the presence of a representative of Sam McKee & Company, and paid the sum of $450; $150 of which being the first month's rent, and the balance being security for last two months rental, under the terms of said lease."

It is important at the outset that you should have a clear conception of what constitutes a crime under this section and of the evidence necessary to establish it. I therefore repeat the statute. It provides that if two or more persons conspire to commit an offense against the United States and one or more of such parties do any act to effect the object of the conspiracy each of the parties thereto shall be guilty of a crime. You will observe that there are three essential elements necessary to constitute a crime under the statute. First, there must be the act of two or more persons conspiring and confederating together; one person cannot conspire with himself. I might state in this connection, though, it is true that while this is so there is no reason why any one conspirator cannot be *trued* without

the other conspirators being tried at the same time; in other words, it is not essential that any more than one conspirator be on trial before you, but it must be shown that there was a conspiracy. It must appear that the purpose of the conspiracy was to commit an act or offense against the United States, that is, to violate some law of the United States, and that one or more conspirators, after the conspiracy has been formed and during its existence, must do some act to effect the object thereof. Each of these elements is an essential ingredient to the crime charged, and must be established to your satisfaction and beyond a reasonable doubt before you can find a verdict of guilty; but if each of these elements is [158] established then the crime of conspiracy is complete, regardless of the fact whether its purpose was accomplished or not. By way of illustration, and illustration only, if two persons should enter into an agreement or conspiracy to violate, we will say, the former Prohibition Law by the possession of and dealing in intoxicating liquors, and one of such persons in pursuance of that agreement, and during its existence, should rent a room and fit it up for the purpose of engaging in this business, the conspiracy would be complete and they would be guilty of conspiracy, although as a matter of fact they never possessed any intoxicating liquor or sold any. So it is important that you keep in mind, in a case of this character, it is not the substantive offense this defendant is charged with violating in the seventh count of the indictment, but a conspiracy or agreement to

commit that offense, and the performance of some act in furtherance of that agreement.

There is nothing obscure or difficult to understand in the term "conspiracy" as used in the statute and in this indictment. Whenever two or more persons act together understandingly to do an unlawful act there is a conspiracy, although there may not have been a definite word, either written or spoken, between them regarding it. Therefore, in the present case if you find that there was an agreement or understanding among the defendant and other persons, or some of them, whether named in the indictment, or not, to accomplish the purpose charged, then you may find that they conspired to commit an offense against the United States as charged in the indictment. It is not material when or where the conspiracy was formed, so long as it existed when the effort was made to carry it out. Information of the criminal purpose should precede the doing of the overt acts, but the [159] latter may be considered in determining whether they were done in pursuance of a conspiracy or not.

The formation or existence of a conspiracy may be shown either by direct and positive evidence or by circumstantial evidence. The law does not require the prosecution to lay its finger on the precise method or manner in which such a conspiracy of the kind here alleged was entered into, if the facts deduced show that such an agreement did exist among the defendants to do the acts charged, because it would be impossible, in the great majority

of cases, for the Government to undertake such proof. The very word conveys the idea of secrecy. Conferences are nearly always held in secret and declarations and agreements are made only in the presence of the conspirators. The fact of a conspiracy almost always must be established more or less circumstantially.

Anyone who after a conspiracy has been formed, with knowledge of its existence, joins therein and aids in its execution, from that time on becomes as much a party thereto as if he had been an original conspirator. Mere knowledge of the existence of a conspiracy without active participation therein is not sufficient to warrant the conviction of any defendant. It is characteristic of the crime of conspiracy that acts done by any one of the conspirators while engaged in the effectuation of the object of the conspiracy are deemed to be the acts and admissions of all and are alike binding on all. *No* so if acts or admissions are done previous to entering into the conspiracy or after the same has been dissolved or the parties thereto have ceased their cooperation; in such case the acts and admissions are binding only on the one acting or speaking.

In this case the Court admitted testimony as to the acts [160] of alleged conspirators who have been arrested. It is the opinion of the Court at this time that that particular testimony should not have been admitted. It is a very close question. The whole issue comes in this case upon whether the conspiracy was terminated by the arrest, at the moment of the arrest. I believe it would be the more

liberal and proper view, and therefore I so instruct you, that where the arrest was made in these cases—where these people were arrested—their statements were taken as against the conspiracy charged to exist, that you shall set those things aside and not consider them in connection with weighing the issues to determine the conspiracy charged.

Where certain overt acts are alleged to have been committed by defendant for the purpose of effecting the object of the conspiracy, that is, carrying it into effect, these overt acts, while essential to be charged and shown are nevertheless no part of the object of the conspiracy. Overt acts, which simply means open and manifest acts which may be established by proof, were acts intended to aid the conspirators in effecting and carrying out the purpose of their alleged unlawful plan and conspiracy. These acts, themselves, need not necessarily be criminal in their nature. They may be as innocent as a man walking across the street to speak to another, but if that act is done as part of the purpose to effect the conspiracy it is criminal to the extent that it enters into making up and effecting the conspiracy under our law. It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable. [161]

Upon the question of intent upon the part of a defendant you are instructed that the law presumes

that every person intends the natural and ordinary consequences of his acts. Wrongful acts knowingly or intentionally committed cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence upon which the jury may be satisfied, from declarations of the person himself, as to what he intended when he did a certain act.

While a conspiracy cannot exist without a guilty intent being there present in the minds of the conspirators, yet this does not mean that they must know that they are violating the statutes or any statute of the United States. The only question for you to pass upon in this connection is whether the defendants conspired to do the things which were in violation of law, not whether they had knowledge that they were violating the law. And this question, like all other questions of fact, is solely for you to determine from the evidence in the case.

There need not even be previous acquaintance, nor is it essential that each conspirator should know the exact part or parts to be performed by the other or others in execution of the conspiracy; in other words, it is sufficient if two or more persons, with knowledge of what they are doing, by their acts and conduct cooperate and work together and in unison in pursuance of a common design or purpose for the obvious effectuation or consummation of a common object, if that object be criminal in character or unlawful, and this whether or not there was at any time an assembling of the parties or specific understanding between or among them.

I will now read to you Section 332 of our Criminal Code, [162] which is as follows:

"Who are *principles.* Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

For one person to abet another person in the commission of a criminal offense simply means to knowingly and with criminal intent aid, promote, encourage or instigate by act or counsel, or by both act and counsel, the commission of such criminal offense. If you believe that the defendant had under his control the management of the premises in which the still was found, and knowing it was there made no effort to remove it, he is guilty as a principal. If the defendant knowingly permitted property leased by him, such as the building, subbasement, wall, or other portion of said property, to be used in whole or in part, or supplied labor or material to be used in connection with an illicit still, and he did so knowingly, then the defendant so acting is *builty* as a principal.

You are instructed that prohibition agents are persons acting for the United States in an official function and their proposed conduct, even in matters which they cannot finally determine, constitutes action on matters before them in their official capacity, or which may be in violation of their lawful duty as specified in the provision I have just read you. [163]

Now, gentlemen, on retiring to the jury room it is necessary for you to bring in a verdict on each of the seven counts in the first indictment. In reaching a verdict it will be necessary that it be the verdict of the jury and also of each and every member thereof. Your first duty will be to elect a foreman and then proceed to your deliberations. When you have reached a verdict it will be signed by your foreman and returned here in open court.

Is there anything further before the jurors retire? If not the jury will retire.

A JUROR: Your Honor, may we have the exhibits that you mentioned?

THE COURT: Have you any objection to all the exhibits being submitted to the jury?

MR. GOULDEN: The Government has no objection.

MR. PERRY: No objection, your Honor. [164]

THE COURT. You may now retire, gentlemen, in charge of an officer.

(Thereupon the jury retired to deliberate upon their verdict; whereupon they returned into court and returned a verdict of guilty upon Counts 1, 2, 3, 4, 5 and 6 and disagree as to Count 7 of indictment No. 24941-L.

Thereupon the Court ordered the sentence and judgment of said Antonio Rocchia continued to June 30, 1934.)

AND BE IT FURTHER REMEMBERED, That thereafter, upon arraignment for judgment, the

defendant presented and filed a motion for new trial in words and figures following, towit:

[Title of Court and Cause.]

"MOTION FOR A NEW TRIAL

"Comes now ANTONIO ROCCHIA, defendant in the above entitled action, by Messrs. George J. Hatfield and Frank J. Perry, his attorneys, and moves the court to set aside the verdict rendered herein and to grant a new trial in said cause and for reasons therefor shows to the court the following:

"1. That the verdict in said cause is contrary to law.

"2. That the verdict in said cause is contrary to the evidence. [165]

"3. That said evidence in the case was not sufficient to justify said verdict.

"4. The court, to the substantial prejudice of the defendant, erred in decisions of questions of law arising during the course of the trial.

"5. The Court, to the substantial prejudice of the defendant, admitted incompetent, irrelevant and immaterial evidence against the defendant.

"6. The court, to the substantial prejudice of the defendant, erred in denying the motion of the defendant for a directed verdict made at the close of the evidence in chief of the Government.

"7. The Court, to the substantial prejudice of the defendant, erred in denying the motion of the defendant for a directed verdict made at the close of all the evidence in the case.

"8. The United States Attorney, during the course of the trial, was guilty of misconduct that was gravely and substantially prejudicial to the rights of the defendant.

"9. The Court, during the course of the trial, was guilty of misconduct that was gravely and substantially prejudicial to the rights of the defendant.

"10. The Court erred in admitting evidence procured in violation of the rights guaranteed to the defendant by the Constitution of the United States.

"This motion is directed to counts 1, 2, 3, 4, 5, and 6 of the indictment separately and severally and the verdict rendered thereon, and it is made upon all the statutory grounds and the reasons for which new trials have been granted in the [166] Courts of the United States.

"Respectfully submitted,

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for defendant

Dated: June 30, 1934

"Receipt of a copy of the foregoing MOTION FOR A NEW TRIAL is hereby admitted this 30th day of June 1934.

H. H. McPIKE
United States Attorney

THOS. G. GOULDEN
Asst. U. S. Atty."

The motion for new trial was denied by the Court, to which ruling the defendant excepted.

(EXCEPTION NO. 36)

Thereupon the defendant presented and filed a Motion in Arrest of Judgment in words and figures following, towit:

[Title of Court and Cause.]

"MOTION IN ARREST OF JUDGMENT

"Now comes the defendant, ANTONIO ROCCHIA, by his attorneys, Messrs. Geo. J. Hatfield and Frank J. Perry, in the above entitled cause, and moves the court to arrest judgment on each and every count in the indictment herein upon which the defendant was convicted, towit: Nos. 1, 2, 3, 4, 5, and 6, on the 27th day of June 1934, for the following reasons:

"1. That any judgment made and entered would be unlawful.

"2. That the facts and allegations therein stated do not constitute an offense against the laws and statutes of the United States.

"3. That the facts and allegations therein stated in counts 1, 2, 3, 4, 5, and 6, and each of them, separately and [167] severally, of said indictment, do not constitute an offense against the laws and statutes of the United States.

"4. That on the trial of said cause the evidence adduced on each of said counts separately and severally of the indictment therein showed that the discovery of the commission of the crime if any was secured by unlawful search and seizure in violation of the rights guaranteed to the defendant

by the Fourth and Fifth Amendments to the Constitution of the United States by reason whereof this court has no jurisdiction to hear and determine said cause or any part thereof.

"5. That the indictment and each count thereof separately and severally is vague, uncertain and indefinite and does not sufficiently state or aver or set forth the alleged offenses charged in said counts against said defendant, or the acts or facts constituting the same, to have apprised said defendant of the crime or offense with which he therein stood charged.

"6. Because the evidence introduced was insufficient to sustain the verdict rendered herein as to each count of the indictment.

"7. Misconduct of counsel for the Government that prevented the defendant from having a fair and impartial trial by the jury and gravely and substantially prejudiced the rights of the defendant therein.

"8. Misconduct of the Court that prevented the defendant from having a fair and impartial trial by the jury and gravely and substantially prejudiced the rights of the defendant therein.

"9. That the verdict is contrary to law.

"10. That the verdict in said cause was not supported by the evidence in the case. [168]

"11. That the Court erred upon the trial in said cause in deciding questions of law arising during the course of said trial, which errors were duly excepted to.

"12. That the Court upon the trial of said cause admitted incompetent, irrelevant and immaterial evidence offered by the United States of America.

"WHEREFORE, defendant moves the court to arrest the judgment against him and hold for naught the verdict rendered against him in said cause on counts numbered 1, 2, 3, 4, 5, and 6, of the indictment, separately and severally.

Dated: June 30, 1934.

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for Defendant

"Receipt of a copy of the above and foregoing MOTION IN ARREST OF JUDGMENT is hereby admitted this 30th day of June 1934.

H. H. McPIKE
United States Attorney

THOS. G. GOULDEN
Asst. U. S. Atty."

The Court denied the Motion in Arrest of Judgment, to which ruling the defendant excepted. [169]

(EXCEPTION NO. 37)

Thereupon the Court imposed judgment and sentence upon the defendant as follows:

On the first count, eighteen months in the Federal Penitentiary, a fine of $100, a penalty of $500.

On the second count, a fine of $100 and a penalty of $1000.

On the third count, a fine of $500 and eighteen months in the Federal Penitentiary.

On the fourth count, a fine of $100 and eighteen months in the Federal Penitentiary.

On the fifth count, a fine of $500 and eighteen months in the Federal Penitentiary.

On the sixth count, a fine of $500 and eighteen months in the Federal Penitentiary.

The penitentiary sentences will run concurrently, so that it will all amount to an imprisonment for eighteen months.

MR. PERRY: Exception.

That the following form of stipulation and order extending term of court was duly signed by Honorable Harold Louderback the trial Judge of said cause and attorneys for the respective parties in the manner set forth in said stipulation and order, and that the date each stipulation and order was signed, filed and time extended are as follows:

[Title of Court and Cause.]

"STIPULATION AND ORDER EXTENDING TERM OF COURT

IT IS HEREBY STIPULATED that for the purpose of serving and lodging proposed amendments to proposed bill of exceptions of the above named defendant duly served and lodged and on [170] file herein, and for the purpose of having the bill of exceptions herein settled and allowed and of making any and all motions in connection therewith, together with taking and perfecting any and all other necessary steps in connection with the appeal of said defendant herein, the term of the above entitled court shall be and hereby is extended

to and including the ——— day of ——— 193—.

Dated: San Francisco, California, ——— 193—.

H. H. McPIKE
United States Attorney
Attorney for Plaintiff

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for defendant

IT IS SO ORDERED

HAROLD LOUDERBACK
Judge of the United States District Court

That the first stipulation and order was duly signed September 24, 1934 and filed with the Clerk of said Court on September 26, 1934, and the term of said court was duly extended to and including November 1, 1934.

That the second stipulation and order was duly signed October 31, 1934 and filed with the Clerk of said Court on October 31, 1934, and the term of said court was duly extended to and including December 1, 1934.

That the third stipulation and order was duly signed November 13, 1934 and filed with the Clerk of said Court on November 14, 1934, and the term of said court was duly extended to and including December 31, 1934. [171]

That the fourth stipulation and order was duly signed December 28, 1934 and filed with the Clerk of said Court on December 29, 1934, and the term of said court was duly extended to and including January 11, 1935.

That the fifth stipulation and order was duly signed January 9, 1935 and filed with the Clerk of said Court on January 10, 1935, and the term of said court was duly extended to and including January 21, 1935.

That the sixth stipulation and order was duly signed January 18, 1935 and filed with the Clerk of said Court on January 21, 1935, and the term of said court was duly extended to and including January 31, 1935.

That the seventh stipulation and order was duly signed January 28, 1935 and filed with the Clerk of said Court on January 28, 1935, and the term of said court was duly extended to and including February 10, 1935.

That the eighth stipulation and order was duly signed February 7, 1935 and filed with the Clerk of said Court on February 9, 1935, and the term of said court was duly extended to and including February 20, 1935.

That the ninth stipulation and order was duly signed February 18, 1935 and filed with the Clerk of said Court on February 20, 1935, and the term of said court was duly extended to and including March 2, 1935.

That the tenth stipulation and order was duly signed February 27, 1935 and filed with the Clerk of said Court on March 1, 1935, and the term of said court was duly extended to and including March 17, 1935. [172]

That the eleventh stipulation and order was duly signed March 15, 1935 and filed with the Clerk of

said Court on March 16, 1935, and the term of said court was duly extended to and including March 27, 1935.

That the twelfth stipulation and order was duly signed March 25, 1935 and filed with the Clerk of said Court on March 27, 1935, and the term of said court was duly extended to and including April 13, 1935.

That on July 3, 1934, said trial judge, Honorable Harold Louderback duly signed an order allowing appeal in the above entitled action and on July 7, 1934 the proposed bill of exceptions and notice of presentation to said trial judge was duly lodged on Honorable H. H. McPike, the United States Attorney, Attorney for Plaintiff with due admission of service by said United States Attorney endorsed thereon and on July 9, 1934 said proposed bill of exceptions was filed with the Clerk of said United States District Court, Northern District of California, Southern Division. [173]

That the following form of order and stipulation extending time for serving and lodging proposed amendments to the bill of exceptions was duly signed by Honorable Harold Louderback, the trial judge of said cause, and the attorneys for the respective parties in the manner set forth in said order and stipulation except that in the first order and stipulation, as hereinafter noted, said order was duly signed by Honorable A. F. St. Sure, United States District Judge in and for said Division and District, by reason of the fact that said Honorable Harold Louderback was not accessible, and that

the date each such order and stipulation was duly signed, filed and time extended are as follows:

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING PROPOSED BILL OF EXCEPTIONS IN THE ABOVE ENTITLED ACTION.

IT IS HEREBY ORDERED that the time for serving and lodging proposed amendments to the bill of exceptions in the above entitled action is hereby extended to and including the——day of —————— 193—.

Dated: ——————193—.

HAROLD LOUDERBACK
United States District Judge

SO STIPULATED:
H. H. McPIKE
United States Attorney
Attorney for Plaintiff

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for Defendant [174]

That the first order and stipulation were duly signed on July 16, 1934, and duly filed with the Clerk of said court on July 16, 1934, and said time was duly extended to and including August 7, 1934.

That the second order and stipulation were duly signed on August 2, 1934, and duly filed with the Clerk of said court on August 3, 1934, and said time was duly extended to and including September 10, 1934.

That the third order and stipulation were duly signed on August 27, 1934, and duly filed with the Clerk of said court on August 29, 1934, and said time was duly extended to and including October 15, 1934.

That the fourth order and stipulation were duly signed on October 11, 1934, and duly filed with the Clerk of said court on October 12, 1934, and said time was duly extended to and including December 1, 1934.

That the fifth order and stipulation were duly signed on November 13, 1934, and duly filed with the Clerk of said court on November 14, 1934, and said time was duly extended to and including December 31, 1934.

That the sixth order and stipulation were duly signed December 28, 1934, and duly filed with the Clerk of said court December 29, 1934, and said time was duly extended to and including January 11, 1935.

That the seventh order and stipulation were duly signed January 9, 1935, and duly filed with the Clerk of said court January 10, 1935, and said time was duly extended to and including January 21, 1935.

That the eighth order and stipulation were duly signed January 21, 1935, and duly filed with the Clerk of said court [175] January 21, 1935, and said time was duly extended to and including January 31, 1935.

That the ninth order and stipulation were duly signed January 28, 1935, and duly filed with the

Clerk of said court January 28, 1935, and said time was duly extended to and including February 10, 1935.

That the tenth order and stipulation were duly signed February 7, 1935, and duly filed with the Clerk of said court February 9, 1935, and said time was duly extended to and including February 20, 1935.

That the eleventh order and stipulation were duly signed February 18, 1935, and duly filed with the Clerk of said court February 20, 1935, and said time was duly extended to and including March 2, 1935.

That the twelfth order and stipulation were duly signed February 27, 1935, and duly filed with the Clerk of said court March 1, 1935, and said time was duly extended to and including March 17, 1935.

That the thirteenth order and stipulation were duly signed on March 15, 1935, and duly filed with the Clerk of said court March 16, 1935, and said time was duly extended to and including March 27, 1935. [176]

[Title of Court and Cause.]

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated by and between the parties to the above entitled action, by their respective counsel, that the foregoing bill of exceptions is in all respects complete and contains all the evidence, oral and documentary, except such documentary evidence as may be duly certified and authenticated

by the Clerk of the above entitled Court and transmitted and filed with the clerk of the Circuit Court of Appeals, and all the proceedings relating to preliminary motions, trial, conviction, motion for directed verdict, motion for new trial, and motion in arrest of judgment of the defendant, including all stipulations and orders filed herein, omitting only title of court and cause, extending term of court, and time of lodging proposed amendments to bill of exceptions; and the same may be settled and allowed as such by the above entitled Court; that the exhibits referred to therein (U. S. Exhibits Nos. 1, 2, 3, 7, 8, 12, 13 and 14) may be duly certified and authenticated by the Clerk of the above entitled court and when transmitted to and filed with the clerk of the Circuit Court of Appeals may be deemed a part of said bill of exceptions and may be referred to by the parties hereto and by said United States Circuit Court of Appeals as fully as though included herein.

Dated: San Francisco, California, March 27, 1935.

H. H. McPIKE
United States Attorney

THOS. G. GOULDEN
Assistant United States Attorney

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for Defendant [177]

[Title of Court and Cause.]

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

Pursuant to said stipulation, the foregoing bill of exceptions is hereby settled, allowed and authenticated as and for the appellant's bill of exceptions for use on appeal in the above entitled action within time allowed by rule and the foregoing orders of the Court and that the same contains all the evidence oral and documentary introduced at the trial of said cause except such documentary evidence as may be duly certified and authenticated by the Clerk of the above entitled Court and transmitted and filed with the Clerk of the Circuit Court of Appeals.

It is further ordered, that exhibits in the above entitled action referred to in said bill of exceptions (U. S. Exhibits Nos. 1, 2, 3, 7, 8, 12, 13 and 14) may be withdrawn and when duly certified and authenticated by the Clerk of this Court, may be transferred to the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, to become a part of the record on appeal, and when so transmitted to the said United States Circuit Court of Appeals, may be referred to by the parties hereto and by said court as a part of said bill of exceptions.

Dated: San Francisco, March 27, 1935.

HAROLD LOUDERBACK
United States District Judge

[Endorsed]: Filed Mar 28 1935 [178]

[Title of Court and Cause.]

SUPERSEDEAS RECOGNIZANCE

KNOW ALL MEN BY THESE PRESENTS, That we, ANTONIO ROCCHIA, as Principal, and EARL S. DOUGLASS, RAY S. ROSSITTER and A. GIANNONE, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand ($10,000.00) Dollars, for the payment of which to the said United States of America well and truly to be made, we and each of us do hereby bind ourselves, our successors, personal representatives, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of October A. D. 1934.

WHEREAS lately, at a session of the United States District Court for the Northern District of California, Southern Division, in a suit pending in said Court, at San Francisco, California, between the United States of America as complainant and Antonio Rocchia, as defendant, a Judgment was rendered against said Antonio Rocchia, defendant, on the 30th day of June, 1934, sentencing said Antonio Rocchia to be imprisoned for a term of—ON FIRST COUNT OF INDICTMENT to be imprisoned for Eighteen (18) months, pay a fine of One Hundred ($100.00) Dollars, and pay a penalty of Five Hundred ($500.00) Dollars; ON SECOND COUNT to be imprisoned for Eighteen (18) months, pay a fine of One Hundred ($100.00) Dollars, and pay a penalty of One Thousand ($1,000.00) Dollars; ON THIRD COUNT to be imprisoned for Eighteen

(18) months, and pay a fine of Five Hundred ($500.00) Dollars; ON FOURTH COUNT to be imprisoned for Eighteen months and pay a fine of One Hundred ($100.00) Dollars; [179] ON FIFTH COUNT to be imprisoned for Eighteen (18) Months and pay a fine of Five Hundred ($500.00) Dollars; ON SIXTH COUNT to be imprisoned for Eighteen (18) months and pay a fine of Five Hundred ($500.00) Dollars. Ordered said terms of imprisonment commence and run concurrently, such imprisonment to be in a United States Penitentiary to be designated by the Attorney General of the United States. Further ordered that if default in payment of fines defendant be further imprisoned until said fines be paid or defendant be otherwise discharged in due course of law, and the said defendant Antonio Rocchia having filed his petition for and obtained order allowing his appeal in the Clerk's Office of said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing it to appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; and whereas the said Antonio Rocchia desires said appeal to operate as a supersedeas and stay of execution and to be admitted to bail and to be permitted to be and remain at large on bail pending said proceedings on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Antonio Rocchia shall prosecute his appeal to effect, and if

he fails to make his plea good, shall answer and pay all damages and costs and shall also personally be and appear here in this court from day to day during the present term and from term to term of this Court thereafter, pending said proceedings on appeal, and shall surrender himself to the United States Marshal of this District and be present to abide the Judgment of this Court or that of the United States Circuit Court of Appeals in and for the Ninth Circuit and serve his sentence, and not depart the jurisdiction of this Court without leave thereof, then this obligation to be [180] void; otherwise to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "Express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

ANTONIO ROCCHIA
EARL S. DOUGLASS
RAY S. ROSSITTER
A. GIANNONE

Subscribed and sworn to before me and acknowledged before me and approved as to Principal and Sureties this 16th day of October, 1934.

[Seal] ERNEST E. WILLIAMS
United States Commissioner
No. Dist. of Calif. [181]

United States of America
Northern District of California—ss.

EARL S. DOUGLASS, whose name is subscribed to the foregoing undertaking as one of the sureties

thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. ———— Street, in the City of Menlo Park, State of California, and by occupation Broker.

That I am worth the sum of Ten Thousand $10,-000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of Seats on San Francisco Stock and Curb Exchange worth $20,000.00. Interest Howell, Brayton Douglas Co. worth $25000.00.

That the encumbrances on the foregoing property are as follows: Clear

. . . .

(List mortgages, trust deeds, etc.)

That my total net assets, above all liabilities and obligations on other bonds, is the sum of over $50,-000.00.

That I am not surety upon outstanding penal bonds, now in force, aggregating total penalty $————.

[Seal] EARL S. DOUGLASS

Subscribed and sworn to before me this 16th day of October, A. D. 1934.

[Seal] ERNEST E. WILLIAMS
United States Commissioner
For the Northern District
of California. [182]

United States of America
Northern District of California—ss.

RAY S. ROSSITTER, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 49 Cerritos Street, in the City of San Francisco State of California, and by occupation Broker.

That I am worth the sum of Ten Thousand ($10,-000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of Interest in 49 Cerritos worth $15000.00; Secured accounts receivable worth $60,000.00;

That the encumbrances on the foregoing property are as follows: $8000.00 against 49 Cerritos;

....

(List mortgages, trust deeds, etc.)

That my total net assets, above all liabilities and obligations on other bonds, is the sum of over $25,-000.00.

That I am not surety upon outstanding penal bonds, now in force, aggregating total *peanlty* $............

(Seal) RAY S. ROSSITTER

Subscribed and sworn to before me this 16th day of October, A. D. 1934.

(Seal) ERNEST E. WILLIAMS
United States Commissioner
For the Northern District
of California. [183]

United States of America
Northern District of California—ss.

A. GIANNONE, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said district and reside at No. 2055 Turk Street, in the City of San Francisco, State of California, and by occupation Laborer.

That I am worth the sum of Ten Thousand ($10,000.00) Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution, and that my property, now standing of record in my name, consists in part as follows:

Real estate, consisting of 2055 Turk (2 flats & garage—) garage at 2053 Turk worth $13000.00

That the encumbrances on the foregoing property are as follows: $15,000.00.

....

(List mortgages, trust deeds, etc.)

That my total net assets, above all liabilities and obligations on other bonds, is the sum of $..........

That I am not surety upon outstanding penal

bonds, now in force aggregating total penalty $..........

That I am single.

(Seal) A. GIANNONE

Subscribed and sworn to before me this 16 day of October, A. D. 1934.

(Seal) ERNEST E. WILLIAMS
United States Commissioner
For the Northern District of California

October 17, 1934 Approved as to form:

H. H. McPIKE
United States Attorney
By THOS. G. GOULDEN
Asst. U. S. Attorney [184]

[Endorsed] Approved
Harold Louderback
U. S. District Court Judge.

FILED OCT 18, 1934
Walter B. Maling, Clerk. [185]

IN THE SOUTHERN DIVISION OF THE
UNITED STATES DISTRICT COURT,
IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA.

No. 24941-L

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO ROCCHIA,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of said Court:

Sir: Please prepare transcript on petition for appeal to the United States Circuit Court of Appeal for the Ninth Circuit to be composed of the following papers:

1. Indictment #34941-L.
2. Arraignment.
3. Plea.
4. Verdict.
5. Minute order of June 27, 1934, continuing judgment.
6. Judgment.
7. Petition for allowance of appeal.
8. Order allowing appeal.
9. Citation on appeal.
10. Assignment of Errors.
11. Bill of Exceptions.
12. U. S. Exhibits Nos. 1, 2, 3, 7, 8, 12, 13 and 14.

13. Supersedeas Recognizance.
14. Praecipe.

Dated: San Francisco, California, March 27th, 1933.

Respectfully requested,

GEO. J. HATFIELD
FRANK J. PERRY
Attorneys for Defendant

[Endorsed]: Filed Mar 27 1935 [186]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

District Court of the United States
Northern District of California—ss.

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 186 pages, numbered from 1 to 186, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of UNITED STATES OF AMERICA vs. ANTONIO ROCCHIA, No. 24941-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirty Three Dollars and Fifteen cents ($33.15) and that the said amount has

been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of April A. D. 1935.

(Seal) WALTER B. MALING
Clerk.
By C. M. TAYLOR,
Deputy Clerk. [187]

[Title of Court and Cause.]

CITATION ON APPEAL

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To UNITED STATES OF AMERICA and to H. H. McPIKE, United States Attorney, Northern District of California, greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein ANTONIO ROCCHIA, defendant, is appellant, and you are appellee, to show cause, if any there be, why the decree or judg-

ment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, this 6th day of July, A. D. 1934.

HAROLD LOUDERBACK
United States District Judge. [188]

Due service and receipt of copy of within Citation on Appeal hereby admitted this 7th day of July, 1934.

H. H. McPIKE
U. S. Atty.
By R. B. McMILLAN
Asst. U. S. Atty.

[Endorsed]: Filed Jul 9 1934 3:01 p. m.
WALTER B. MALING
Clerk.

[Endorsed]: Transcript of Record. Filed April 10, 1935, Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7829

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

ANTONIO ROCCHIA, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

BRIEF FOR APPELLANT.

GEORGE J. HATFIELD,
FRANK J. PERRY,
333 Montgomery Street, San Francisco,
Attorneys for Appellant.

FILED
MAY 28 1935
PAUL P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 7829

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONIO ROCCHIA, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	}

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

On November 14, 1933, the Grand Jury returned an indictment against Frank Ferrari, Silvio Cappi and Antonio Rocchia charging them in the first six counts with violating certain sections of the Internal Revenue Act relating to the possession of a still without registering the same; failure to give notice and file bond; carrying on business of a distiller with intent to defraud the United States of taxes; making and fermenting mash and the manufacture of alcohol. Count seven of said indictment charges said defendants with conspiracy to violate said sections of the Internal Revenue Act. (Tr. 2.)

Antonio Rocchia was the only defendant on trial. The jury returned a verdict of guilty on the first

six counts of said indictment and disagreed on the seventh count thereof.

The premises in question were located at 60 Brady Street, San Francisco, California, and consisted of a concrete building having a 50 foot frontage and a depth of 100 feet. The building had two front entrances. One entrance consisted of a sliding door divided into three sections and for convenience may be called the main door. The upper part of this doorway was glass. The other entrance was at the extreme right of the building, consisted of a door of ordinary size and for convenience may be called the small door. In the front of the building and attached to it was a sign indicating some kind of a drayage business. There was no sign to indicate that the business engaged in that building might be a distillery. (Tr. 94.)

On January 9, 1933, about 4:30 p. m., John M. Burt, Keith DeKalb and William P. Goggin, investigators in the Alcohol Tax Unit, Bureau of Internal Revenue, visited said premises. Investigator Goggin had received information that there was a distillery in operation therein. While said investigators were on the street in front of said premises they detected a strong odor of distillation and fermenting mash. (Tr. 94.) The investigators approached the main door and heard the sound of burners and blowers inside the building. It was a roaring sound common to a gas burner when it is operating under pressure. They looked through the glass portion of the main door and saw about 30 feet distant therefrom a partition running parallel with the front of the build-

ing. They could not see beyond this partition. Against this partition they saw a large pile of cartons. They also saw large tire tracks running from the front door, towards the partition and disappearing under the cartons. (Tr. 95.) They did not see anything that indicated that there was anybody there. (Tr. 96.)

Investigator Goggin opened the main door and all three investigators entered the premises. The interior of the building may be described as follows: The front part of the building between said partition and the main door was divided by another partition, making two rooms. The room leading from the main door and through which the investigators entered was the larger of the two rooms. This room was on the right hand side as you face the building. There was a door leading from this room to the other room on the left. In the latter room there was a door leading to the rear of the premises and to the still room. It was through these doors that the investigators travelled when they found the still, mash, and a quantity of alcohol and whiskey. (Tr. 99.) There was a man in the still room at the time and he gave the name of Frank Ferrari. He was arrested, questioned and searched. They found on his person a key which fitted the small door at the extreme right of the building. (U. S. Exhibit 4.)

About six p. m. one Silvio Cappi entered the premises through said front door. He was arrested, questioned and searched. They found on his person a key which fitted said front door. (U. S. Exhibit

5.) About 6:30 or 7 p. m. Investigators Goggin and DeKalb left the premises with Ferrari and Cappi. Investigator Burt remained in the still room to retain custody over the seizure. (Tr. 103.) About 8:10 p. m. Antonio Rocchia entered said premises through the small door and was immediately placed under arrest and searched. (Tr. 138.) There was found on Rocchia's person a wallet with a number of papers, a quantity of currency, a small purse with some currency in it and a number of various papers and a key which fitted the front door. Investigator Burt segregated the papers (U. S. Exhibits 7, 8 and 11) and returned to Rocchia the wallet and the small purse. (Tr. 140.)

About 10 p. m. Investigators DeKalb and Goggin returned to said still premises and saw defendant Antonio Rocchia in custody of Investigator Burt. (Tr. 144.) Investigator Goggin as he came into the room walked over in front of the defendant Rocchia, who was sitting on a yeast box and stopped in front of him and looked down and said, "Well, John (Investigator Burt), it looks like you have the Big Shot", and Burt replied, "Yes, it looks like I have, search him and see what you think." (Tr. 145.) The evidence was incompetent and improper and should not have been received as an admission. The statement was admitted over the objection of the defendant (Tr. 144, 5) to show what the defendant did under the circumstances. It was a statement not directed to him and was of such a nature as not to call for a reply. Shortly thereafter the investigators left with Rocchia

and took him to their office and fingerprinted him. (U. S. Exhibit 3.)

During the course of the trial the Government showed that a certain lease covering the property in question was executed by Axel L. Thulin, as lessor, and Joseph Rossi, as lessee. (U. S. Exhibit 13.) In attempting to prove that the signature "Joseph Rossi" was written by defendant Antonio Rocchia, the Government offered in evidence as exemplars the bond signed by defendant for his appearance in court in the case at bar (U. S. Exhibit 12), a finger-print card dated January 9, 1933, and signed "John Caruso" and applying to the case at bar (U. S. Exhibit 3) and a finger-print card dated October 11, 1930, signed "Antonio Rocchia" (U. S. Exhibit 14) and which had no connection with the case at bar. Objection to the receipt in evidence of said U. S. Exhibit 14 was duly made and exception noted. (Tr. 162, 167.) The writing "Antonio Rocchia" thereon was not proved by any witness to be that of the defendant and before it could be used as an exemplar in connection with the lease the handwriting expert was required first to establish its identity.

The Government also used as an exemplar a sheet of paper with a list of words and figures in two columns. (Tr. 161.) This paper was taken from the person of the defendant when he was searched by Investigator Burt (Tr. 140), and is a part of U. S. Exhibit 7. Said sheet of paper was partly written in Italian and translation thereof (U. S. Exhibit 11) over defendant's objection, was received in evidence.

(Tr. 157, 158.) Professor Edward O. Heinrich, the handwriting expert, appearing as a witness for the Government, stated that said sheet of paper was handed to him as an exhibit but was told that it might be Antonio Rocchia's handwriting. It was given with the reservation that it had not been identified. (Tr. 165.) From the signatures on the other undisputed exemplars, to-wit, said appearance bond and finger-print card dated January 9, 1933 (U. S. Exhibit 3), Professor Heinrich identified it as being in Rocchia's handwriting and then used said writing on said sheet of paper (U. S. Exhibit 7) to some extent as an exemplar together with finger-print card dated October 11, 1930 (U. S. Exhibit 14), in attempting to arrive at an opinion as to the authorship of the disputed writing on said lease. (Tr. 164-167 U. S. Exhibit 13.)

Mr. Sam McKee, a real estate agent, testified on behalf of the Government and he said that his office negotiated for the lease of said premises. He said he did not know the defendant and had never seen him before. That said defendant Antonio Rocchia was not the man who was introduced to him prior to the time the lease was signed and when the lease was being negotiated. (Tr. 146-7.)

The District Attorney improperly used said finger-print card dated October 11, 1930, signed "Antonio Rocchia" and referring to an offense which had no connection with the case at bar. There was no necessity for the Government using said fingerprint card nor said sheet of paper. (U. S. Exhibit 7.) There

were other available genuine signatures of the defendant which could have been used, as will hereinafter appear in the argument, instead of bringing before the jury evidence having no bearing on the case and highly prejudicial to the defendant. (Tr. 160-167.) Said fingerprint card had nothing to do with the case at bar. It was taken long ago in connection with another arrest. This card contained a statement of the arrest. It showed no disposition of the offense. The defendant contends that the use of said fingerprint card was to get into the record indirectly said prior criminal record. It was prejudicial to him and a complete discussion of this error appears in the fourth ground for reversal as set forth herein.

In attempting to show the defendant's connection with the still, the United States Attorney offered in evidence photostatic copies of certain papers taken from the person of the defendant. (U. S. Exhibits 7 and 8.) In opposition to such offer, the defendant offered in evidence a certain order for the return of personal property and signed by Frank H. Kerrigan, United States District Judge in relation to the matter in controversy and filed on January 30, 1933 (Defendant's Exhibit 1 for identification Tr. 113), long before the indictment was returned which was on November 14, 1933. (Tr. 106-127, 141-144.) The trial judge permitted collateral evidence to be received in relation to said order. The United States Commissioner testified in respect thereto. (Tr. 151.) The said order of Frank H. Kerrigan had never been amended or set aside. It was binding on the trial

judge and the evidence in controversy (U. S. Exhibits 7 and 8) should never have been received. The defendant contends that the trial court erred in receiving in evidence said Exhibits 7 and 8 and the collateral inquiry in connection with said order of Frank H. Kerrigan. Said order was in full force and effect, had never been set aside or amended and could not be set aside by another judge of the same court. A discussion of this error appears in the second ground for reversal as set forth herein.

As part of said Exhibit 8 is a certain note or memorandum addressed to no one but signed by H. Von Husen, Inspector, San Francisco Water Department, which reads as follows:

> "I have shut off your water at valve in water box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and call at office 425 Mason Street.
>
> Von Husen, Inspector, S. F. Water Department 1/4/33 1:30 p. m."

(Tr. 150.)

This note was identified by said H. Von Husen, who stated that he had put it under the small door of 60 Brady Street. It was not shown that the defendant ever answered or acted upon it. It was prejudicial to the defendant and should not have been received. Defendant claims error in connection with said note in that it was not shown by the government that the defendant either answered or acted upon it. A discussion of this error appears in the third ground for reversal as set forth herein.

During the course of the trial the United States Attorney while offering testimony in connection with said photostatic copies of papers taken from the person of the defendant at the time of his arrest (U. S. Exhibits 7 and 8) stated in answer to an objection by the defendant (Tr. 118-122) that "if the defendant desires to produce them we will be glad to use them". When defendant objected to this statement the court replied that "He (U. S. Attorney) can demand any documents proper to be introduced by you (defendant)." The defendant assigned the remarks of the United States Attorney and the court as misconduct and in each instance requested the court to instruct the jury to disregard them which was refused. Since these errors occurred at the same time they are argued together in the fifth ground for reversal as set forth herein.

ASSIGNMENTS OF ERROR.

Numerous assignments of error were taken to the testimony of witnesses and to the introduction of evidence at the trial. They may be summarized as follows:

(1) Search and seizure were unreasonable and in violation of defendant's constitutional rights under the Fourth and Fifth Amendments to the United States Constitution.

(2) Error of court in admission of papers taken from the person of defendant at the time of his arrest (U. S. Exhibits 7 and 8) and excepted to by him.

(3) Error of court in admission of note or memorandum written by H. Von Husen, Inspector, S. F. Water Department. (Part of U. S. Exhibit 8.)

(4) Error of court in admission of translation of certain sheet of paper containing two columns of writing and is part of U. S. Exhibit 7. (Translation is U. S. Exhibit 11.)

(5) Error of court in admission of fingerprint card dated October 11, 1930, signed Antonio Rocchia (U. S. Exhibit 14) and having no relation to the case at bar.

(6) Misconduct of United States Attorney in effect calling on defendant to produce original papers in relation to photostatic copies then before the trial court.

(7) Error of court in refusing to instruct the jury to then and there disregard the demand made by the United States Attorney for said original papers.

(8) Misconduct of trial court in saying in connection with said demand of said United States Attorney that said United States Attorney can demand any documents proper to be introduced by the defendant.

(9) Error of court in refusing then and there to instruct the jury to disregard the said remarks of said trial court.

(10) Error of court in admission of statements made by and between investigators Burt and Goggin in presence of defendant.

(11) Error of court in refusing admission on behalf of defendant of petition for exclusion of evidence and return of property before the United States Commissioner and order for return of personal property signed by Frank H. Kerrigan, United States District Judge. (Defendant's Exhibit 1 for identification Tr. 110, 114.)

In the argument herein presented we will, however, for the sake of brevity, endeavor to consider as many of these assignments collectively as may be possible under the circumstances.

ARGUMENT.

I.

FIRST GROUND FOR REVERSAL.

SEARCH AND SEIZURE WERE UNREASONABLE AND IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(Assignments of Error 1, 2, 3, 4, 5, 6, 7, 11, 12, 14, 15, 16, 17, 18, 19, 28, 29, 30, 32, 39; Tr. 16-22, 25-52, 60-65.)

On November 14, 1933, the Grand Jury of the United States in and for the Northern District of California returned an indictment against Antonio Rocchia, Frank Ferrari and Silvio Cappi charging them with violating certain provisions of the Internal Revenue Act and with conspiracy to so violate said Act. (Tr. 2.)

On December 23, 1933, said defendant Antonio Rocchia filed a verified motion to suppress evidence upon the ground that the search and seizure at the time of the arrest of said defendant Antonio Rocchia was in violation of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. (Tr. 79.)

On January 6, 1934, at the hearing on said motion to suppress, the following proceedings were had:

> "John M. Burt, called for the United States, being duly sworn, testified as follows: Direct examination. I am an investigator in the Bureau of Investigation, Department of Justice, and I was such on January 9, 1933, and prior thereto. On or about January 9, 1933, I made an investigation of the premises known as 60 Brady Street. On that day investigator Goggin told me in the presence of investigator De Kalb that he had gotten information that a distillery was in operation at said premises. At 4:30 P. M. on that day the three of us proceeded to the vicinity of that address and observed a strong odor of fermenting mash and distillation in the vicinity; that odor was traced to 60 Brady Street.
>
> The Court: When you say 'traced' you mean you approached the premises and determined to your satisfaction the odor came from them?
>
> A. Yes. Standing at the door of No. 60 Brady Street, I could hear the roar of a gas burner and the hum of motors inside, and then observed the odor of distillation.
>
> Q. Where were you standing when you heard the hum of the motors?
>
> A. On the sidewalk in front of 60 Brady Street. Investigator Goggin slid back the front door,

which was not fastened. Before doing so we had observed the odor of fermenting mash, and there was a sign up over one of the doors indicating that a drayage company was operating in there. We looked in through the glass and saw no drays——

Q. How near the sidewalk was that?

A. We were on the sidewalk at the time.

Q. How far away did you look through?

A. This was right on the sidewalk. We could see in about 20 or 25 feet back from the front what appeared to be a newly erected partition and through one small aperture at the top of that partition I saw a light coming through and I saw what appeared to be the top of a large door that had been cut in the partition, but was concealed all but about six inches by a large pile of pasteboard cartons. There were truck tracks running back along that pile of cartons apparently through that doorway. Investigator Goggin then slid back this door, which was not fastened, and we entered the building.

Q. Just stop there for a minute. You had smelled what you thought was fermenting mash?

A. Yes.

Q. You had heard the hum of motors?

A. Yes.

Q. Had you heard any sound indicating anybody was present on the premises?

A. No.

Q. Proceed.

A. In this partition there was another small door which Investigator Goggin opened, it being unfastened, and we entered the rear part of the premises. We there saw a man standing by an alcohol receiving tank drawing alcohol into a five-

gallon can, and a large alcohol distillery in full operation, full of mash and sacks of sugar. He was placed under arrest." (Tr. 80-82.)

On February 2, 1934, and prior to the ruling by said trial court on said motion to suppress, said defendant Antonio Rocchia filed a verified amended motion to suppress upon the same grounds as in the original motion. (Tr. 88.)

That after hearing and consideration of said motion to suppress as amended the same was denied and exception noted. (Tr. 88.) During the trial and upon the presentation of evidence of said search and seizure said defendant Antonio Rocchia renewed said motion to suppress and objected to admission of evidence thereof which were denied by said court and exceptions taken to the rulings thereon. (Tr. 95, 96.) At that time said defendant suggested to said trial court that the said objections so made follow throughout this particular line of testimony. The trial court stated that it was necessary to make the objection each time that it was wanted in the record. (Tr. 97.)

At the outset it is well to bear in mind that the Constitution is to be liberally construed.

In *Gouled v. U. S.*, 255 U. S., 298 at 304, it was held:

> "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

See also

Grau v. U. S., 287 U. S., 124 at 128;
Boyd v. U. S., 116 U. S., 616 at 635.

Furthermore it is a duty of the court to protect the constitutional rights of persons against encroachments thereon. In this connection see *Boyd v. U. S.,* 116 U. S., 616 at 635:

> "This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."*

See also

U. S. v. Lefkowitz, 285 U. S. 452 at 464, Par. 3.

The foregoing authorities mean that if there is any question as to the validity of a search determining weight should be given to the broad consideration of the constitutional right intended to be saved and perpetuated by the Fourth and Fifth Amendments.

In this respect District Judge Thomas in *U. S. v. DiCorva,* 37 Fed. (2d) 124, said:

> *"I admit that the question is by no means free from doubt, but my conclusion is that, in the matter of doubt, it is better to uphold the Constitutional immunities than to be keen to discover a basis for circumventing them.*

I think the language of the Supreme Court in Byars, Petitioner, v. United States, 273 U. S. 28, 47 S. Ct. 248, 250, 71 L. Ed. 520 decided on January 3, 1927, embodies the spirit which should guide federal courts in judging in any doubtful case involving the application of the Bill of Rights. The court there said: 'The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.'

Or, as Justice Bradley said in Boyd v. United States, 116 U. S. 616, at page 635, 6 S. Ct. 524, 535, 29 L. Ed. 746: 'It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.'

In the Byars case we have about the last word from the Supreme Court on the merits of the controversy at bar. It is instructive to note that on page 29 of 273 U. S., 47 S. Ct. 248, 71 L. Ed. 520, Justice Sutherland said: 'A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed'."

It is well to note from the above that in *U. S. v. DiCorva,* supra, it was held that if there is doubt as to the reasonableness of the search and seizure it is best to uphold the constitutional guarantees and therefore it should be resolved in favor of the defendant. It has long been established that the constitutional protection extends beyond the home and protects the places of business, factories or other houses of the defendant. *In re Phoenix Cereal Bev. Co.,* 58 Fed. (2d) 953 at 956, the court said:

> "Constitutional protection extends beyond the home and this plant is protected against unlawful searches and seizures as is any other business place."
>
> *Gouled v. U. S.,* 255 U. S. 298 at 309;
> *U. S. v. Lefkowitz,* 285 U. S. 452 at 464.

The facts set out above for convenience may be briefly summarized as follows: That the investigators having had information that a still was operated at 60 Brady Street they went near the premises indicated, smelled odors of fermenting mash and distillation and heard burners and the hum of motors. Through the windows they saw many cardboard cases and entered through a door.

Under these facts the investigators claim the right to enter without a search warrant. They did not see nor hear anyone in the premises. There was no offense being committed in their presence nor did they have probable cause to believe that a felony was being committed.

The investigators went to the place with information that a distillery was being operated on the premises. This was pure hearsay. As the investigators were near the premises they smelled the odor of fermenting mash and distillation. This alone was not knowledge that there was a still in the premises. They also heard the roar of burners and motors. They assumed from this that a still was in operation in said premises.

Probable cause must be based on facts. In *Wagner v. U. S.*, 8 Fed. (2) 581 at 583 C. C. A. 8, Paragraphs 1, 2, it was held:

> "The evidence before the judge or commissioner who issues the search warrant must be such as would be admissible on trial. Giles v. U. S. (C. C. A.) 284 F. 208, 214. The commissioner must be furnished with facts—not suspicions, beliefs, or surmises. Veeder v. U. S., 252 F. 414, 164 C. C. A. 338. A mere conclusion is insufficient either in the affidavit or the complaint. U. S. v. Kaplan (D. C.) 286 Fed. 963, 969."

See also *Grau v. U. S.*, 287 U. S. 124 at 128, Third Paragraph.

Since it is necessary to submit facts to the United States Commissioner to support a search warrant the investigators upon making a search and seizure without a warrant must likewise have facts before entering the premises and not mere suspicions, beliefs, or surmises.

Probable cause must not be based upon suspicion. *Brown v. U. S.*, 4 Fed. (2d) 246 C. C. A. 9, Paragraph 2.

Likewise an assumption must not be based on an assumption to supply elements to support probable cause. In *Ranelli v. U. S.* 34 F. (2d) 877 at 880 C. C. A. 8, it was held:

> "There is a second reason why the prohibition agent did not have knowledge through his sense of smell that the crime in question was being committed in his presence. Let it be granted for the sake of argument that the sense of smell gave the prohibition agent knowledge that there was fermenting mash in the house. This was not knowledge that there was a still in the house; much less that the still was unregistered. There was no evidence to show, and it is not claimed, that the smell of fermenting mash from an unregistered still is any different from the smell of fermenting mash from a registered still, from an ordinary cauldron, or from a kitchen stewpan.
>
> The truth of the whole matter seems to be that the prohibition agent detected a smell coming from the residence, which he assumed or inferred was the smell of fermenting mash; he assumed further that some person was in the house in possession of a still containing the mash; he assumed further that the still was unregistered. *This series of assumptions would not be admissible evidence in court to prove that a crime was being committed; neither did it constitute knowledge in any true sense of the word on the part of the prohibition agent that the crime for which defendant was afterward indicted was being committed in his presence.*"

The investigators, prior to entering said premises in the case at bar, could not say that there was a still in

operation nor could they say that anyone was in the building. They simply assumed from the smell of the mash that there was then and there mash upon the premises; they assumed from the roar of the burner and the noise of the motors that a still was being operated. From the assumption of the presence of mash on the premises and from the assumption from the roar of the burners and the noise of the motors that a still was in operation the investigators further assumed that there was someone on the premises. It is submitted that this series of assumptions is not sufficient to support probable cause to believe that a crime was being committed.

The controlling case on the subject of searches and seizures is that of *Taylor v. U. S.*, 286 U. S. 1, decided by the Supreme Court on May 3, 1932, where the facts are peculiarly like those in the instant case. As stated by Justice McReynolds, the facts of that case were as follows:

> "During the night, November 19th, 1930, a squad (six or more) of prohibition agents, while returning to Baltimore City, discussed premises 5100 Curtis Avenue, of which there had been complaints 'over a period of about a year'. Having decided to investigate, they went at once to the garage at that address, arriving there about 2:30 a. m. * * *
>
> As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight, they looked through a small opening and saw many cardboard cases which they thought probably contained jars of liquor. There-

upon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise." (286 U. S. at p. 5.)

The court held that the search violated the constitutional rights of the defendants and reversed the conviction which had theretofore been had, saying:

> "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.
>
> We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed." (286 U. S. at p. 6.)

This decision was an affirmation by the Supreme Court of the rule laid down in this circuit beginning with *Temperani v. U. S.*, 299 F. 366. In that case, the facts, as stated by Judge Rudkin, were as follows:

> "Some time prior to December 1, 1922, certain federal prohibition agents were informed that intoxicating liquor was manufactured in the garage beneath the dwelling. On the above date the officers visited the premises, and detected the

odor arising from the manufacture of intoxicating liquor emanating from the garage. They thereupon forced an entry and discovered stills in operation, a quantity of intoxicating liquor, and a quantity of mash used in the manufacture thereof. At the time of the entry there was no person in the garage, and the plaintiff in error was absent from home."

Our Circuit Court held the search bad, and at page 367 said:

"The government, as we understand it, does not claim the right to search a private dwelling or garage under the facts disclosed by this record, but an attempt is made to justify the conduct of the officers under the common-law or statutory rule permitting peace officers to make arrests for offenses committed within their presence. But here the offender was not in the presence of the officers; he was not in the garage, and they had no reason to suspect that he was there. *Laying all pretense aside, the officers entered the garage, not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury, and whatever necessity may exist for enforcing the National Prohibition Act,* (Comp. St. Ann. Supp. 1923, sec. 10138¼ et seq.) *or other laws, the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If present laws are deficient in not permitting the search, in a constitutional way, of homes where intoxicating liquor is known to be manufactured, the remedy is with Congress, not in subterfuge or evasion.* For these reasons, the

> court should have kept from the jury all property found on the search and all evidence given by the officers concerning the same." (Italics ours.)

The *Temperani* case was cited with approval by the Circuit Court of the United States in the case of *Agnello v.* United States, 269 U. S. 20 at 33.

In this circuit on February 8, 1932, an opinion was rendered in *Donahue v. United States,* 56 F. (2) 94 at 95, wherein the question of the reasonableness of a search and seizure was discussed. The facts showed that the agents received information that Donahue intended to make second run of liquor at his ranch on the next day which was Sunday. The next day the agents went there. As they approached the house they got the smell of liquor and heard the still in operation. They entered the house and found the defendant. That case is distinguished from the case at bar in the following particulars: The premises before us consisted of a large concrete building, which had a sign on the front thereof indicating there was some kind of a drayage business conducted therein. (Tr. 95.) In other words, the building presented the appearance of some commercial industry. The record does not show that this building was off by itself but we may assume that being commercial that there were buildings similar in type to it and adjacent thereto. In the building in question there were paper cartons. The noise of the burners and hum of motors may reasonably have been from the operation of a legitimate business and the containers therein used in connection therewith.

The agents said they traced the odor of fermenting mash and distillation to this building. The agents did not make any special investigation such as going on the adjoining property to determine the source thereof, and to be sure that it did not come from some other building. (Tr. 87.)

The odor of mash permeates the atmosphere and spreads out generally so that it becomes extremely difficult to say with precision that it is coming from a certain spot. The only reasonable way to determine its source is by investigation. It is different, of course, in a case like *Donahue v. United States,* where the building is in an open space such as a farm and is by itself. In such a case it may reasonably be traced to the farm house. In the case at bar the agents by failure to complete their investigation could not with reasonable certainty say that the odor of mash and distillation came from within. Nor is that all. In *Donahue v. United States* (supra) the search and seizure were made on Sunday. In the case at bar the search began January 9, 1933, about 4:30 p. m., which was *Monday.* (Tr. 99.) This was during business hours. The noise the agents heard could have come from the operation of a legitimate business. Again the agents failed to investigate and determine the real nature of the noises. They were content to make a cursory observation from the sidewalk. (Tr. 81.)

What may be sufficient probable cause to search a ranch house on Sunday, a day of rest, may be greatly insufficient in the search of city commercial property on a day when business generally is carried

on. Each case must stand or fall on its own facts. In the case at bar the investigators simply drew hurried conclusions without properly verifying the surrounding facts and their search was without reasonable or probable cause. It was circumstances like these that the court had reference to in *United States v. Lefkowitz,* 285 U. S. 452 at 464, where it was said:

> "Indeed, the informed and deliberate determination of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

See also *Taylor v. U. S.,* 286 U. S. at pages 5 and 6, where it was said:

> "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.
>
> "We think, in any view, the action of the agents was inexcusable and the seizure unreason-

> able. The evidence was obtained unlawfully and should have been suppressed."

It will be well to note in passing that *Taylor v. United States,* (supra), was decided shortly after *Donahue v. United States,* (supra).

A case similar to the instant case is that of *United States v. Hirsch,* 57 F. (2) 555. In that case, prohibition agents, over a period of several days got the odor of fermenting mash from a brewery which had its doors and windows shuttered up and barred up. Also, one of the agents put his ear to a crack in the wall of the building when he heard what appeared to be running machinery. The question, as stated by the court, was as follows: Did the condition and circumstances as testified to by the prohibition agents who testified to perceiving the smell of fermenting mash when they got close to the building, justify the assumption that a crime was being committed in the presence of the officers? The court held that it was not sufficient and granted the motion to suppress, saying:

> "Can it be said that the odor of distilling mash in the vicinity of a closed building together with some smoke coming from the chimney of the building and some sound which might have come from machinery within the building is sufficient to justify the conclusion that an illicit still was being operated within the building?
>
> The cases of Raniele v. U. S., 34 F. (2d) 877 (C. C. A. 8th) and De Pater v. U. S., 34 F. (2d) 275, 74 A. L. R. 1413 (C. C. A. 4th), are authority

for the proposition that such evidence as has been adduced here is not sufficient to authorize the search of premises without a search warrant. These are cases in which a private house was searched, but the language of the court in discussing the principle is broad enough to cover other than residences. Other cases in which it has been held that the sense of smell is not sufficient evidence to warrant a search are: Temperani v. U. S. (C. C. A. 9th) 299 F. 365; Bell v. U. S. (C. C. A. 9th) 9 F. (2d) 124; Schroeder v. U. S. (C. C. A. 9th) 14 F. (2d) 500; Staker v. U. S. (C. C. A. 6th) 5 F. (2d) 312; Day v. U. S. (C. C. A. 8th) 37 Fed. (2d) 80; U. S. v. Dean (D. C. Mass.) 50 F. (2d) 906; U. S. v. Tachino, Number 5858 Criminal, oral opinion by Judge Woodrough (D. C. Nebraska).

A reading of the cases leads to the conclusion that the tendency of the courts is to hold that sense of smell must be supported by other concrete facts, and circumstances surrounding the situation to justify the conclusion that the crime is being committed. * * *

To hold in this case that the search was legal would be practically to hold that the officers could enter any building if they testified that they smelled fermenting mash coming from it, or if they smelled about the building any other odor that is frequently present in the making or possession of intoxicating liquors. I agree with most of the others judges who have written on this subject that the olfactory organs of the average prohibition agent are not sufficiently trained and accurate to be relied upon by the courts without

supporting evidence from the other senses. Professor Wigmore, in Principles of Judicial Proof (2d Ed.) Secs. 172, 173, comments on the unreliability of the sense of smell as evidence, and after giving some illustrations states this conclusion: 'Statements by witnesses concerning perceptions of odor are valueless unless otherwise confirmed.' * * *

I am conscious that in this case, as in many others of this nature that we have to pass upon, the event justified the suspicions of the prohibitions agents. It may be that such evidence as they had gathered was sufficient for them to have obtained a search warrant on probable cause. Quandt Brewing Co. v. U. S., 47 F. (2d) (C. C. A. 2nd). In any event, by putting a watch on the place they would certainly have learned things about its use and occupation that would have adequately bolstered up their sense of smell. My conclusion is that on the evidence as it is presented in this case the agents were not justified as a matter of law in breaking into these premises on the theory that a crime was being committed in their presence."

Furthermore, in the orderly procedure of investigation the facts then and there procured should have been submitted to the United States Commissioner in support of an application for a search warrant. They went to said premises and searched for the still. They took it upon themselves to enter. As part of the series of Internal Revenue Acts under which the indictment was returned and to be considered with them

is *Section 3462 R. S.,* providing for issuance of search warrants when a fraud on the revenue has been or is being committed and provides as follows:

> "The several judges of the circuit and district courts of the United States, and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal revenue officers to search any premises within the same, if such officer makes oath in writing, that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."

The Internal Revenue Laws are subject to the constitutional limitations. (*United States v. Swan,* 15 Fed. (2) 598 at 599; *Wagner v. United States,* 8 Fed. (2) 581 at 584 C. C. A. 8th.) This section lays down the orderly manner in which agents may lawfully enter premises. There was no necessity for brushing this procedure aside. The investigators saw no one. There was no probability of an immediate change in the premises or of those who might be connected with it. Under the circumstances they should have procured a search warrant. See *Taylor v. United States,* 286 U. S. at pages 5 and 6, supra.

Enactment by Congress of Section 3462 R. S. was not an idle act nor is the Supreme Court's opinion to be taken as just mere words. They were made to preserve the constitutional guarantees and to prevent encroachment thereon. In this connection see *U. S. v. Lefkowitz,* 285 U. S. 452, at 464, supra.

In *U. S. v. DiCorva*, 37 Fed. (2) 124, at page 132, the court stated as follows:

> "It is safer to require a strict compliance with the law that search warrants be procured than to permit prohibition agents to become a law unto themselves and improperly act without a search warrant. The machinery is provided for the use of the prohibition agents, and in such a case as this record presents it appears that here was an instance where the agents not only could have secured a warrant, but should have done so before making the arrest and seizure."

It will be seen from the above that prior to entering said premises by said investigators they observed no offense being committed in their presence nor did they have probable cause to believe that a felony was being committed therein. The search and seizure therefore were unreasonable and the motion to suppress should have been granted on behalf of said defendant.

II.

SECOND GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF PHOTOSTATIC COPIES OF PAPERS TAKEN FROM THE PERSON OF DEFENDANT AT THE TIME OF HIS ARREST.

(Assignments of Error 11, 12, 14, 23, 27, 35, 41; Tr. 25-30, 44, 55, 58, 66, 72.)

In this connection the facts may be briefly stated as follows:

On January 9, 1933, while Investigator Burt was alone in said still premises, the defendant Antonio Rocchia entered and was immediately placed under arrest and searched. Burt found a wallet with a number of papers and a quantity of currency and a small purse also with currency in it, together with some bills rolled in his pocket. Investigator Burt kept the papers and returned the wallet and small purse and money to Rocchia. (Tr. 140.) At the trial there was shown to the agents as witnesses on behalf of the government, over objection of defendant, photostatic copies of the papers taken from the person of the defendant. (U. S. Exhibits 7 and 8, Tr. 106, 123, 141.)

In support of said objection said defendant offered in evidence the order for return of personal property signed by Frank H. Kerrigan, United States District Judge, together with petition for exclusion of evidence and return of property before United States Commissioner Ernest E. Williams in connection with the evidence which is the subject of this prosecution. The offer was denied and exception noted. (Tr. 106, Defendant's Exhibit 1 for identification.)

The said photostatic copies were later received in evidence. (U. S. Exhibits 7 and 8, Tr. 143.) They may be described as follows:

Exhibit 7 comprises: (1) Cash receipt dated January 9, 1933, for a certain number of sacks of cane sugar, argo and cans, totaling $280; (2) one sheet of paper with numbers and dates thereon; (3) one sheet of paper containing the words "zucchero" and "yeast" and certain sums besides each item, together with other words thereon, apparently written in Italian. (See translation, U. S. Exhibit 11, Tr. 158.)

Exhibit 8 comprises: (1) Automobile operator's license of Antonio Rocchia; (2) two receipts for foreign money orders for 500 lire each, showing purchase by Antonio Rocchia on December 5, 1932; (3) Duplicate deposit slips of Antonio Rocchia with American Trust Company; (4) a card containing the name Joseph Daneri and telephone number; (5) letter of H. Von Husen, inspector, S. F. Water Department, dated January 4, 1933, relative to use of water; (6) insurance policy holder's identification card.

The United States Attorney in order to collaterally attack said order for return of personal property signed by Frank H. Kerrigan, United States District Judge (Tr. 113), called the United States Commissioner Ernest E. Williams to testify to the record of the proceedings before him on January 25, 1933, on the preliminary hearing of said offense, the subject of this trial. Commissioner Williams testified as follows:

"There was a hearing on this complaint. I am of the opinion that there was a motion to suppress filed before me. I have not the papers. They are in the clerk's office. I would have to have the file to be able to say that there was a Motion to Suppress filed on behalf of the defendants in this case, particularly the defendant Caruso. I am of the opinion that there was. I have nothing in my docket to show it. My records show what the disposition of the case was by me; on January 28, 1932, I held the defendant Ferrari and I dismissed the other defendants, towit, Cappi and Caruso (Rocchia).

I have in my docket that Mr. Abrams, who represented the Government at that time, consented to the dismissal of Caruso and Cappi. I have forgotten whether I decided a motion to suppress, but I would assume that I dismissed it upon the suggestion of Mr. Abrams, or, rather, dismissed them. I cannot say there was no motion to suppress presented to me. I have forgotten about that. I would say they were dismissed because Mr. Abrams moved to dismiss. I follow the policy of the United States Attorney, that is, if he suggests a dismissal I accept the suggestion. I would say there was no ruling by me on any motion to suppress so far as the defendant Caruso is concerned. I do not feel certain of my statement when I say that was my course of conduct in that case because I have had so many cases; I merely have in my docket that Abrams consented to the dismissal of Cappi and Caruso, which would indicate to me clearly that is the reason I dismissed them. I recollect signing an affidavit in which I set forth that I had not

passed upon that matter. I signed a document entitled 'Affidavit of Ernest E. Williams, United States Commissioner,' Filed February 1, 1934, with the Clerk's office. I have read the affidavit and it is correct. The affidavit is to the effect that the motions to suppress were presented but no ruling was had upon them, at all.

This affidavit was sworn to by me on January 6, 1934. I don't know when the petition to suppress was filed. (Defendant's Exhibit No. 1 for identification.) I have no record of that in my docket. I have no place there for such notation. The arrest took place on January 9, 1933, and the transcript of testimony taken on January 25, 1933, was taken before me as United States Commissioner. The matter was presented before me on January 25, 1933, and the ruling was made on January 28, 1933."

(Tr. 152-154.)

The defendant at the conclusion of said Commissioner's testimony again offered in evidence said motion to exclude and return property and order for return of personal property (Defendant's Exhibit 1 for identification) which was refused and exception noted. (Tr. 155.)

For convenience, the orders of the court admitting in evidence said photostatic copies (U. S. Exhibits 7 and 8) and refusal to receive in evidence, on behalf of defendant, said petition for exclusion of evidence and return of property filed before said United States Commissioner and said order for the return of personal property (Defendant's Exhibit 1 for identification) may be considered together.

Where the search and seizure was held unreasonable and papers taken in connection with such search were ordered returned, it was error to use photostatic copies thereof in evidence upon the trial. In this connection, in *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385 at 390, 391 and 392, it was held:

> "The facts are simple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books etc., were taken at once. An application was made as soon as might be to the District Court for a return of what thus had been taken unlawfully. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the District Attorney to the approach of those concerned in the act by an invalid subpoena for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. Photographs and copies of

material papers were made and a new indictment was framed based upon the knowledge thus obtained. The District Court ordered a return of the originals but impounded the photographs and copies. Subpoenas to produce the originals then were served and on the refusal of the plaintiffs in error to produce them the Court made an order that the subpoenas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The Government now, while in form repudidating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. U. S., 232 U. S. 383, to be sure, had established that laying the papers directly before the Grand Jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not*

merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

To permit the use of papers in evidence when the search and seizure were held unreasonable is equivalent to compelling the defendant to be a witness against himself.

In *Gouled v. U. S.*, 255 U. S. 298 at 306 it was held:

> "The second question reads:
>
> 'Is the admission of such paper in evidence against the same person when indicted for crime a violation of the 5th amendment?'
>
> Upon authority of the Boyd Case, supra, this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

It will be noted that on January 25, 1933, the hearing was had before the United States Commissioner and on January 30, 1933, said order of Frank H. Kerrigan for return of personal property was filed. Said order is still in full force and effect. It has never been amended or set aside. Said order therefore was and is binding on the trial court. To permit a collateral inquiry of said order and allow evidence to be received in contravention thereof was

equivalent to decreeing that said Judge Frank H. Kerrigan's order was of no binding force and effect. This the trial court had no right to do. In *Hardy v. North Butte Mining Co.*, 22 F. (2d) 62 (C. C. A. 9), the facts showed that in the United States District Court for the District of Montana upon complaint filed praying, among other things, for appointment of two ancillary receivers and answer thereto consenting to such appointment the court appointed two receivers. Later the receivers presented a report and petitioned the court for an order confirming certain acts as such receivers. The court was presided over by a different judge, who made an order on its own motion requiring the parties to show cause why the order theretofore made appointing the receivers should not be vacated, on the ground that it was mistakenly and improvidently made, and why the receivership should not end and the suit be dismissed. On the return to the order to show cause, the court made a final order discharging the receivers and dismissing the suit. This appeal was taken therefrom. As to the right of said judge to make said final order in a case previously presided over by another judge in the same court Judge Rudkin said at page 63 as follows:

> "The sole question presented for decision in this: If an order appointing receivers is made in a suit within the jurisdiction of the court making the order, and in the exercise of judicial discretion, may another judge sitting in the same court, on the same record, of his own motion or otherwise, vacate the order of appointment because, in his opinion, the order was mistakenly

or improvidently made. On both principle and authority this question must be answered in the negative.

* * * * * * *

In Plattner Implement Co. v. International Harvester Co., supra, Judge Sanborn said:

'But the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed.'

In Commercial Union of America v. Anglo-South American Bank, (C. C. A.) 10 F. (2d) 937, the court said:

'The situation presented, therefore, is this: That after one judge sitting in the case had decided the complaint to be sufficient, another judge sitting in the same court decided it was insufficient and dismissed it. We are not aware that it has ever before happened that in the Southern district of New York, or in any district within

this circuit, one judge has in effect undertaken to set aside or ignore an order made by another judge of co-ordinate jurisdiction in the same suit.'

And after a searching and painstaking review of the authorities, the court concluded:

'We have at some length set forth the rulings of the federal courts on the effect of a decision made by a trial judge upon the right of a judge sitting subsequently in the same court and in the same case to overrule the decision of the first judge on the same matter. We have done so because the question raised is important, and has to do with the dignified and orderly procedure of the courts, and is a departure from what has been regarded heretofore in this and in the other circuits as improper and not to be countenanced.'

If the original order appointing the receivers could be vacated and set aside by another judge sitting in the same court, on the ground that the order was made mistakenly and improvidently, it would seem to follow that the order vacating the appointment and dismissing the complaint could be set aside by another and different judge, sitting in the same court, on the same ground, and for the same reason, and we would then be confronted with the intolerable situation to which Judge Sanborn referred.

* * * * * * *

The decree of the court below, dismissing the complaint and discharging the receivers, must be reversed; and it is so ordered."

If this were not so then every order, even long after the time to correct or amend has passed, is not

free from attack. Such a situation cannot be countenanced.

It is well to note that said order for return of personal property was approved by the United States Attorney and filed five days after the hearing before the United States Commissioner. The United States Attorney was a party to the proceedings. He made no objection, in fact, he concurred. No steps were taken by the United States Attorney to amend or correct the order. It was not until the time of trial, to-wit, June 24, 1934, that the United States Attorney attempted to nullify said order. (Tr. 108.) Having been content to wait from January 30, 1933, to June 24, 1934, before even attempting to correct said order, he cannot now complain.

In *Mitchell v. Cunningham,* 8 F. (2d) 813 (C. C. A. 9), the facts disclosed:

On April 10, 1920, property in dispute belonged to Chas. Rury; on that day he executed conveyances to Mitchell. On December 9, 1920, Rury filed a voluntary petition in bankruptcy and was adjudged a bankrupt. Cunningham was appointed trustee. On January 12, 1921, Cunningham brought suit in Superior Court for Benton County to set aside conveyances. Mitchell answered and on November 1, 1922, decree entered setting aside deeds and conveying property to Cunningham. Mitchell later filed suit to quiet title to said property and Cunningham set up adjudication. Mitchell contended that the decree in the former suit should not have gone further than to charge the property with a lien in such sum as

would suffice to pay Rury's indebtedness at the date of the conveyances. In answer to this the court held:

> "In the former litigation, appellee alleged that he was the qualified and acting trustee in bankruptcy in the matter of the bankruptcy of Charles Rury; that with intent to defeat the claims of his creditors, on the 10th of April, 1920, Rury conveyed the property in dispute without consideration to appellant; that there were outstanding claims of creditors, proof of whose claims had been filed with the referee in bankruptcy; that the trustee had no funds or assets with which to pay these claims and the expenses of the bankruptcy proceeding. The complaint also alleged with particularity the bankruptcy proceeding and adjudication. Based on these allegations, appellee prayed that the deeds referred to be set aside, and that appellant be required to convey the properties to appellee to be administered in bankruptcy. In his answer appellant admitted some of these allegations, traversed others, and set up an affirmative defense. The decree followed the prayer of the complaint.
>
> Appellant had an opportunity to be heard as to all matters involved in the litigation, including the form of the decree. He cannot now be heard to say that the whole proceeding should be disregarded, because the decree gave larger relief than was warranted by the facts alleged and proved. The decree of a court of general jurisdiction, which is responsive to the prayer of plaintiff's initial pleading, and which has some reasonable support in the allegations thereof, cannot be treated as a nullity, where the defendant appears generally and is heard. The correct-

> ness of the decree will not be inquired into on collateral attack." (at p. 815.)

It is apparent that the government was aware of the proceeding and form of the order and is therefore bound by it.

Assuming, only for the sake of argument, that the United States Attorney had the right to attack said order collaterally, in doing so the government must show *affirmatively* the grounds for such attack. In this connection in *Archer v. Heath,* 30 F. (2d) 932 (C. C. A. 9), it was held:

> "This is an appeal from an order discharging the appellee from the custody of the warden of the United States penitentiary at McNeil Island, Washington, to whose custody he had been committed in execution of a final judgment of the United States Court for China. The reason for the discharge was that the information upon which the conviction was had failed to charge that the appellee was a citizen of the United States at the time of the commission of the crime. * * *
>
> In considering the question thus presented we must bear in mind the nature of the attack on the judgment of conviction and the wide distinction between a direct and a collateral attack. Where a judgment of a United States court is attacked directly by appeal, the judgment will be reversed, unless the jurisdictional facts appear some place in the record; but on a collateral attack, such as by habeas corpus, the judgment is presumptively valid, unless it appears affirmatively from the record that the court was without jurisdiction." (At p. 933.)

In support of the United States Attorney's attempt to collaterally attack said order for return of personal property one and one half years after its issue, he called the United States Commissioner Ernest E. Williams, whose testimony may be summarized as follows: That the United States Commissioner was of the opinion that the motion to suppress was filed before him on behalf of said defendant; that there was nothing in his records showing that he dismissed the defendant and that Mr. Abrams, who represented the government at the time, consented to dismissal; that he had forgotten whether he had dismissed the motion to suppress; that there was no ruling by him on any motion to suppress so far as the defendant was concerned but that he did not feel certain of this statement because he had so many cases; that his docket merely showed that Abrams consented to dismissal of the defendant which indicated to him that this was the reason why he dismissed him. (Tr. 152-3.)

It is clear from this that the record of the United States Commissioner was not complete, that his testimony was uncertain and there was no positive assurance on his part of just what was done. It is true that when shown an affidavit signed by him and dated February 1, 1934 (one year after said order of Frank H. Kerrigan), he said that he recollected signing it and that it was correct. It must be remembered that his records were incomplete and do not reflect the extent of the proceedings before him. The testimony he gave is the best recollection and as he says himself, "I do not feel certain of my statement when I say that was

my course of conduct in that case because I have so many cases."

This is just why the courts adhere to upholding orders as against collateral attack. The order was made five days after the hearing before the United States Commissioner, the United States Attorney concurred, now he seeks by very uncertain testimony, to say the least, to set aside that order. If he is successful, then no order is free from attack.

The burden was upon the United States Attorney to affirmatively show that the proceedings before the United States Commissioner revealed no action taken on the motion to suppress. That by reason of the uncertainty of the testimony and the incompleteness of the record of the Commissioner, the United States Attorney failed to make the proper showing. The photostatic copies of said papers should not have been admitted in evidence.

That these papers were detrimental to the defendant cannot be denied. They contain memoranda relative to sugar, argo, yeast, a note from the water company, besides highly immaterial matter such as auto operator's license, bank deposit slips, purchaser's receipts for foreign money order, and insurance policy holder's identification card. They could only be received as admissions to show his connection with the still in question. Some of the items referred to in said memoranda, such as sugar, could have been used in the still operations, but so could it have been used in connection with other matters and for legitimate purposes.

This type of admission is dangerous and should be received with great caution. The jury upon hearing of items of sugar, yeast and reading the note from the water company and the translation (U. S. Exhibit 11), would be strongly inclined to believe that because of them the defendant Antonio Rocchia was connected with the still. It was error to receive them and prejudicial to the defendant. The prejudicial effect of these papers was aggravated by reason of the comments of the United States Attorney and the court in connection with testimony in relation to them. The record shows that when objection to their use was duly made, the United States Attorney said that "if the defendant desires to produce them we will be glad to use them". (Tr. 119.) The jury was no doubt impressed with the remark and naturally looked to the defendant for the originals. Great significance was given to it when the court in refusing to instruct the jury to disregard it said that "He (U. S. Attorney) can demand any document proper to be introduced by you (defendant)". (Tr. 120.) When the court's attention was called to this latter statement, the court upon due request refused to instruct the jury to disregard it. (Tr. 121.) The jury was then firmly convinced that the defendant was withholding papers that should have been produced. They were anxious to know what they were and were careful to note them when received in evidence. The papers so received were clearly detrimental to the defendant and greatly prejudiced him before the jury.

III.

THIRD GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF NOTE OR MEMORANDUM WRITTEN BY H. VON HUSEN, INSPECTOR, SAN FRANCISCO WATER DEPARTMENT.

(Assignment of Error 40; Tr. 11-12, 14, 23, 27, 35; Exhibits 7 and 8.)

Harold Von Husen called for the United States testified that on January 4, 1933, as an inspector for the San Francisco Water Department he called at 60 Brady Street, San Francisco to read water meter; that there was a very large delivery of water at 60 Brady Street, San Francisco, and the meter was running wide open. He knocked on the door at the office and got no response; that he looked inside but could see no one because of all the partitions there. He went to the garage door, the folding door, and pounded on it with his book, but got no response. He left a note and put it under the small door. Over objection and exception of the defendant (Tr. 149, 150) the United States Attorney showed the witness a photostatic copy of a note (part of U. S. Exhibit 8) he left under the door. He stated that it was a true copy. The note was read in evidence and is as follows:

> "I have shut off your water at valve in water box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and called at office 425 Mason street.
>
> Von Husen, Inspector, S. F. Water Department
> 1/4/33 1:30 P. M."
>
> (Tr. 149-151.)

The witness stated he never saw the defendant Rocchia before the time of trial. The original of photostatic copy of said note was taken from the person of the defendant by Investigator Burt at the time of his arrest and search. (Tr. 140.) Objection and exception were made to the introduction in evidence of said note. (Tr. 143.)

There was no evidence introduced by the Government to show that said note was ever answered or acted upon. It may be that defendant when he entered the premises through the small door picked up the note and put it in his pocket. Investigator Burt did not see the defendant until he came from the small room to the large room. (Tr. 138.) The receipt in evidence of said note was prejudicial error. In *Poy Coon Tom v. United States,* 7 F. (2) 109 at 110, C. C. A. 9, Judge Rudkin in considering a similar question, held as follows:

> "In the course of the trial, the following letter, found in the possession of the plaintiff in error upon a search of his home, was offered in evidence against him, and was admitted over objection and exception:
>
> 'Dear friend Tom: Come on over this afternoon. No one will see you come in. So you come in the back way. I will watch for you. I want to see you on business. I am giving you something so come this afternoon—so we are alone and can talk, I want to see you about something. I may go to the hospital tomorrow. I am so worried I can hardly write now. Tom, do as I tell you. If you don't come this afternoon I cannot give you anything. Bring about one M and 2 C with you.

Now, be sure to come, for I may not get a chance to talk with you soon again; and I want to pass you on to something and cannot very well, unless we are alone. Come any time after one o'clock. Now, do it. If you don't, you may be sorry.'

The prosecuting officer stated to the court that M and C referred to morphine and cocaine, and that his purpose in offering the letter was to show that the plaintiff in error was a known trafficker in narcotics, and that he had not only sold narcotics to the informer in question, but to others as well.

We do not understand upon what principle the letter was admitted or was competent. It was manifestly not admissible as the unsworn declaration or statement of the unknown writer, and it was equally inadmissible for the purpose of showing an admission or an implied admission on the part of the plaintiff in error, in the absence of proof tending to show that the letter was answered or otherwise acted upon.

'The fact that an unanswered letter or other paper is found in the custody of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him. Were it admitted, an innocent man might, by the artifice of others, be charged with a prima facie case of guilt, which he might find it difficult to repel.' Wharton's Crim. Ev. (10th Ed.) p. 1411.

'It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements, it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, but it has been uniformly held

by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter.' Packer v. United States, 106 F. 906, 910, 46 C. C. A. 35, 39.

'The letters, however, if properly identified, would not of themselves authorize any inference against the defendants; they were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants, by some reply or statement, or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants. Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence, in the latter case, may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received but never answered, or acted upon.' Commonwealth v. Eastman, 1 Cush. (Mass.) 215, 48 Am. Dec. 596.

'The maxim (qui tacet consentire videtur) had also been applied, as between the parties, to certain mercantile dealings, as where an account current was sent to the party by letter, and no objection made to it within a given time, established by convenience or by commercial usage. * * * But it could not, in principle, be applicable to facts stated in a letter which the party was not bound, nor interested, to answer. It would be placing a man entirely at the mercy of others, if he was to be bound by what others chose to assert, in addressing letters to him. In no sense, could his silence be considered an admission of such facts.' People v. Green, 1 Parker Cr. R. (N. Y.) 17.

* * * * * * *

> The admission of the letter was therefore prejudicial error. We find nothing in the remaining assignments calling for comment or consideration.
>
> The judgment is reversed, and the case is remanded for a new trial."

It is evident from the above that defendant Antonio Rocchia was substantially prejudiced by such evidence.

Said note of Von Husen was addressed to no one. This document was offered as an admission to show his connection with said still. It no doubt had great weight with the jury.

IV.

FOURTH GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF FINGERPRINT CARD DATED OCTOBER 1, 1930, SIGNED ANTONIO ROCCHIA AND HAVING NO RELATION TO CASE AT BAR.

(Assignments of Error 43, 44, 45; Tr. 74, 76.)

THE UNITED STATES ATTORNEY HAD NO RIGHT TO USE SAID FINGERPRINT CARD (U. S. EXHIBIT NO. 14) AS A HANDWRITING EXEMPLAR.

The evidence shows that during the course of the trial Investigator De Kalb produced from the files of his office two fingerprint cards; one was marked case No. 20,895, dated October 1, 1930, and signed Antonio Rocchia; the other was marked S. F. 24,928-F, dated January 9, 1933, and signed John Caruso. (Tr. 131.)

Said fingerprint cards No. 20,895 and No. 24,927 were thereupon marked as one exhibit, to-wit, U. S.

Exhibit 7 for identification, and later over objections and exceptions, card No. 20,895 as U. S. Exhibit 14 in evidence (Tr. 167) and card No. 24,927 as U. S. Exhibit 3 in evidence. (Tr. 134.) The United States Attorney stated that he hoped to establish the signature on the lease (U. S. Exhibit 13) by identifying certain signatures. (Tr. 131.)

By way of further exemplars as handwriting specimens the Government offered in evidence the appearance bond in the case at bar. (U. S. Exhibit 12.) In connection with this exhibit, it was conceded by defendant's counsel that the signature on said bond was in the handwriting of the defendant Antonio Rocchia. (Tr. 159.) The Government also used as an exemplar containing a specimen of the handwriting of the defendant, a certain sheet of paper containing a list of words and figures in two columns. This sheet of paper is part of U. S. Exhibit 7 (Tr. 161) and was taken from the person of the defendant at the time of his arrest and search. (Tr. 140.) When said sheet of paper was given to the handwriting expert, he was told that it might be Rocchia's handwriting. That it might not be fully identified. (Tr. 165.) Before using said sheet of paper as an exemplar, it was necessary for said expert first to establish it as being in the defendant's handwriting from other exemplars which was done. (Tr. 165.) It is well to note at this time that on fingerprint card dated October 1, 1930 (U. S. Exhibit 7 for identification and later received as U. S. Exhibit 14), the signature of Antonio Rocchia was not identified by any witness, and that the Gov-

ernment sought to prove it through the handwriting expert by comparing the fingerprints thereon with the fingerprints on U. S. Exhibit 3. (Tr. 162.) The testimony and objection in this case is as follows:

> "MR. GOULDEN. Q. You have examined the fingerprint on the card, Government's Exhibit No. 3, (in evidence) have you, John Caruso?
>
> A. Yes.
>
> Q. Have you also examined the fingerprint on the card Government's Exhibit No. 7 for identification, (U. S. Exhibit No. 14 in evidence) Antonio Rocchia?
>
> A. Yes.
>
> Q. Are you prepared to say whether or not the fingerprints are of the same man?
>
> A. I am——
>
> MR. PERRY. Just one moment, please. I am going to make an objection now, and I will make an objection later on; I am going to object to the further use of the fingerprints. As I understood it, when these documents were introduced in evidence first the only use of the documents was for the purpose of the handwriting. Now counsel for the Government endeavors to use by way of comparison the fingerprints on those two cards and by those two cards, I mean Government's Exhibit No. 3 in evidence and Government's Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence). I mention this at this time your Honor, because they are trying to introduce or show prior transactions that this defendant may have had in other matters and to bring it in in this manner, and which could not have been brought into this court in any other way. In other words, by a subterfuge they are bringing in under the guise of

the handwriting matter something to use against this defendant. I object to it on that ground and as a matter of principle.

THE COURT. It is certainly pertinent evidence and I will overrule the objection. Let us proceed with the examination.

MR. PERRY. Exception.

MR. GOULDEN. Q. Would you say at this time in your expert opinion that the fingerprints on the two cards (U. S. Exhibit No. 3 in evidence and U. S. Exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence),) are one and the same man?

MR. PERRY. I object to it on the ground that the use of these documents is prejudicial so far as the defendant Rocchia is concerned, and I assign the examination and the use of those documents with respect to fingerprints by the United States Attorney as misconduct, and I ask your Honor to instruct the jury to disregard it.

THE COURT. The objection will be overruled.

MR. PERRY. Exception.

A. They are the fingerprints of one and the same man." (Tr. 162, 163.)

Thereafter the Government offered in evidence fingerprint card U. S. Exhibit 7 for identification, and it was then marked as U. S. Exhibit 14 in evidence. (Tr. 167.) Said offer and objection in connection therewith is as follows:

"MR. GOULDEN. I neglected or I overlooked requesting that Government's Exhibit No. 7 for identification be admitted in evidence. Professor Heinrich identified it, that being the fingerprint card with the signature Antonio Rocchia upon it.

THE COURT. Then this will be received as U. S. Exhibit 14 in evidence.

MR. PERRY. I object to it as immaterial, irrelevant, and incompetent, and upon the ground that it is prejudicial to the rights and interests of my client to introduce this document in evidence bearing his purported fingerprints and his signature; it violates the constitutional rights of the defendant, particularly as respects the Fourth and Fifth amendments.

THE COURT. Ruling will stand.

MR. PERRY. Exception." (Tr. 167.)

It is well to pause here for a moment and get the significance of this proof. The U. S. Attorney attempted to prove a writing on a fingerprint card (U. S. Exhibit 7 identification, U. S. Exhibit 14) with another fingerprint card by comparing the fingerprints. (U. S. Exhibit 3.) He does it so that he can use the unproven signature as an exemplar in connection with the signature on the lease regardless of the irrelevant and prejudicial matter contained in said exemplar.

Said Exhibit 14 besides bearing the signature Antonio Rocchia and the fingerprints, also contains the following notation:

"Case No. 20895
Date of Arrest October 1, 1930
Charge—Possession Still and whiskey
Criminal History
Antonio Rocchia No. 20226
San Francisco charge mdfg."

(The original exhibit was duly certified and filed with the clerk of the Circuit Court of Appeals.)

This prior record of Antonio Rocchia has no place in this trial and to offer it was prejudicial. Let us proceed further to the utter lack of necessity for its use as an exhibit as a handwriting exemplar. The exemplars used by the handwriting expert may be summarized as follows:

(1) Finger-print card No. 24,298 bearing the name of John Caruso, U. S. Exhibit 3;

(2) Finger-print card No. 20,895, bearing the written name of Antonio Rocchia, U. S. Exhibit 14;

(3) Appearance bond bearing a signature in the handwriting of Antonio Rocchia, U. S. Exhibit 12, and

(4) A sheet of paper containing some writing and taken from the person of the defendant when arrested, U. S. Exhibit 7.

With these exhibits U. S. Exhibits 3 and 12 were established as being in the handwriting of Antonio Rocchia. As to U. S. Exhibits 7 and 14 they were disputed handwritings and were given as such to the handwriting expert. (Tr. 165.) It is apparent that were the handwriting expert to establish the identity of the person signing the lease (U. S. Exhibit 13) it would be necessary for him to establish that the disputed exemplars (U. S. Exhibits 7 and 14) were in the handwriting of the defendant and then in turn use them as exemplars. There were other undisputed exemplars available to the U. S. Attorney as will hereafter appear. In this connection Edward O. Heinrich, the handwriting expert testified as follows:

"Q. Was Exhibit 7 (in evidence) used as an exemplar, or was it used for the purpose of determining whether or not Rocchia's writing was on that document?

A. Primarily, it was identified as being probably in Rocchia's handwriting. From the signatures I identified it as his handwriting, and therefore used it to some extent as a guide in considering the other evidence. * * * (Tr. 164.)

I did not have any other writings as the foundation or basis for my expert opinion. It was only told to me that that might be Rocchia's handwriting on Government's Exhibit 7 in evidence. When they submitted all these documents they were variously described. U. S. Exhibit No. 7 was described as an exemplar with a reservation that it had not been fully identified; that is the way it was presented to me. I included it in one of my exemplars with that reservation until after I had established my basis on the comparison of signatures, and thereafter I considered it with relation to the signature. * * * (Tr. 165.)

On government's exhibit No. 7 for identification (U. S. Exhibit No. 14 in evidence) being a fingerprint card and signed Antonio Rocchia and dated October 1, 1930, I examined the signature Antonio Rocchia on that document as well as the fingerprints on that document. * * * (Tr. 161.)

"MR. GOULDEN. Q. You have examined the fingerprint on the card, Government's Exhibit No. 3, (in evidence) have you, John Caruso?

A. Yes.

Q. Have you also examined the fingerprint on the card Government's Exhibit No. 7 for identification, (U. S. Exhibit No. 14 in evidence) Antonio Rocchia?

A. Yes.

Q. Are you prepared to say whether or not the fingerprints are of the same man?

A. I am." (Tr. 162.)

After due objection and exception the witness was permitted to testify as follows:

"They are the fingerprints of one and the same individual." (Tr. 163.)

This certainly was a roundabout way of proving a disputed signature. To say the least, the method of proof was not only most unusual but highly unsatisfactory. These were not the only exemplars available to the Government. There are others which contained the undisputed signature of the defendant. Let us look at the record and see what exemplars were available: The verified plea in abatement and motion to suppress subscribed by defendant Antonio Rocchia (Tr. 80); verified amended plea in abatement and motion to suppress subscribed by said defendant. (Tr. 88.) These are the only ones appearing in the record. There were, no doubt, other exemplars that could have been used, such as the appearance bond signed by the defendant filed with the United States Commissioner in connection with the preliminary hearing. The Government was in the possession of these additional exemplars and the signatures undisputed. This indicates that the Government was not sorely in need of undisputed exemplars. The Government does not even claim the lack of exemplar material.

Why then did the Government use the writing, Antonio Rocchia, on the disputed fingerprint ex-

emplar (U. S. Exhibit 14) to aid in proving a materially disputed document? (U. S. Exhibit 13.) It was only done to prejudice the defendant before the jury by letting them know that the Government already had his fingerprints and getting before them the prior record of the defendant which was set out in said fingerprint card.

Under the facts of this case the fingerprint card should not have been received for any purpose. There was no question of the defendant's identity nor was his character in issue. His character becomes an issue when tendered by him. This, he did not do. The only admitted purpose for which said fingerprint card (U. S. Exhibit 14) was received in evidence was as an exemplar to prove the handwriting on the lease. The statement of his prior criminal record on said fingerprint card affected his character and was therefore prejudicial.

In such a situation, to-wit, where the government is in possession of evidence definitely establishing the point, it is error to even remotely touch upon a prior offense, which error is prejudicial in nature. In *Fish v. U. S.*, 215 F. 544, the defendant was charged with the arson of a certain schooner with intention to prejudice the underwriters who had insured the same. The evidence beyond a doubt established the fact that the defendant had set the fire which caused the destruction of the yacht. Notwithstanding, evidence was introduced that two years prior to the instant offense, defendant had suffered the loss of another yacht, together with an automobile, under cer-

tain circumstances which would reasonably lead to the conclusion that those two fires as well had been incendiary in nature. The court held that the proof of the two prior alleged offenses was not in order by reason of the facts of the case and its admission was prejudicial, saying:

> "Such being the state of the proof negativing any idea that the fire might be accidental, we are of the opinion that this was not a case where evidence of previous fires should have been received for this purpose. Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case. People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. Lepage, 57 N. H. 245, 295, 24 Am. Rep. 69." (at page 549.)

and further stated with reference to the proof of a prior offense, quoting from *State v. Raymond,* 21 Atl. 330:

> "There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition." (215 F. at 551.)

It is evident that the introduction of such proof goes to the character of the defendant, which matter is not in issue until such a time as it is tendered by him by his taking the stand and further opening the issue by the introduction of character proof on his part. So

in *People v. Sharp,* 14 N. E. 319, a New York case, the action was for bribing a public official, which proof was adequately shown. Further evidence was adduced to show an alleged prior bribing of another official. The court said:

> "The commission of a crime by Sharp in 1884 was distinctly in issue. It was bribery but the subject was Fullgraff * * * (the case for which the defendant was being tried). In the commission of that crime the law presumed Sharp to be innocent. If Sharp had given evidence of good character the prosecution might have answered that evidence by proof that his character was bad; but I believe it has not been thought by any judicial tribunal that such evidence could be given in anticipation of proof from the defendant, nor that the issue upon it could be tendered by the prosecution." (citing cases) (page 339).
>
> "The indictment is all that the defendant is expected to come prepared to answer. Therefore the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise and do him manifest injustice by creating a prejudice against his general character." (p. 339.)

Let me repeat again, it is evident that the intention of the District Attorney in the case at bar was to introduce into evidence and to prejudice the defendant by proof in a roundabout manner, the introduction of which would be not allowed directly, of a prior offense. A case similar in effect is *Mercer v. U. S.,* 14 F. (2) at 281 (3rd Circuit). Therein a prior attorney for one of the defendants was put on the

stand and asked if he did not know that the defendant had been tried and convicted prior thereto of forgery. Objection was made on the grounds of prejudice and overruled and the question put again, to which an objection and exception were taken. The court held the attempt to be improper, prejudicial and to render a fair trial impossible. That having failed to take the stand, his reputation and character were not in issue and proof to controvert the same was not admissible; that the evident purpose of the District Attorney was to get before the jury damaging statements in violation of all rules of evidence. The court, at page 283, stated as follows:

> "*The defendant was presumed to be innocent until his guilt of the offense charged was proved. If he had offered himself as a witness, he might, like any other witness, have been questioned, within well-defined limits, as to any former conviction, for the purpose of affecting his credibility. But, not having testified, and not having put in issue his reputation for good character, or his credibility, the general rule of law is that evidence assailing his character or showing previous conviction is not admissible.* * * * When the defendant does offer himself as a witness, his previous conviction may be shown only to affect his credibility. * * * *The evident purpose of the assistant United States attorney, and what he actually did, was to get before the jury, in violation of all rules of evidence, damaging statements,* put in the form of questions, which greatly prejudiced the defendant.
>
> However depraved in character, and however full of crime the past life of the defendant may

have been, he was entitled to a fair trial on competent evidence. Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077. Otherwise our courts would cease to be courts of law and become courts of men. Liberty regulated by law is the underlying principle of our institutions. Sparf and Hansen v. United States, 156 U. S. 51, 103, 715, 15 S. Ct. 273, 39 L. Ed. 343.

The learned District Judge in his charge referred to the objectionable statements, and said that, in view of Hamill's answer, there was no evidence of Mercer's previous conviction, and the jury should not consider it in passing upon his guilt. But they were not stricken out. They still stand in the record, and the jury was left under the impression, or, at least, might draw the inference, that they might consider them to affect the credibility of Hamill, and discredit him. *These statements were improper, prejudicial, and rendered a fair trial impossible.* * * *" Reversed.

In *Beyer v. U. S.*, 282 F. 225, paragraph 4, C. C. A. 3, the facts showed the defendant was charged with possession for sale on June 19, 1920. He denied such possession and stated that he had not sold any since repeal started. Under cross-examination he testified that he did not have any liquor in his place since the time prohibition went into effect. He was then asked by the United States Attorney if he recalled a seizure of liquor made in his place on March 10, 1920. He said that he might have had a bottle that day for his own use. The Government witnesses in rebuttal were permitted to testify to finding three bottles in de-

fendant's safe. This was held to be prejudicial error. The court, at page 227, said:

> "While proof of the possession of liquor at another time was collateral and immaterial, so far as establishing the issue on trial was concerned, its effect upon the jury was detrimental and prejudicial to the defendant. Evidence that he committed other crimes at other times may not be admitted to show that he had it within his power and was likely to commit the particular crime with which he was charged. * * * It is easy to see how such evidence might prejudice the jury, render a fair trial impossible, and lead to conviction.
>
> We are therefore constrained to reverse this case and grant a new trial."

In the case at bar had the defendant taken the stand the Government could not have examined him in relation to the charges as they appeared on the fingerprint card. Much less could it be done without him taking the stand.

A similar case to the case at bar arose in *People v. Van Cleave,* 208 Cal. 295, wherein the defendant was convicted of the crime of burglary. His identity was made from the presence of certain fingerprints on the drawer of a trunk and by testimony of an expert in the police department. Nevertheless the fingerprint card from the prior burglary was admitted in evidence over objection and the same was held to be error, the court saying at page 300:

> "After appellant's arrest his fingerprints were taken by an expert in the police department. The

expert testified that the distinguishable thumb-print on the metal bar which held in place the drawers in the trunk of the complaining witness was the counterpart of a thumb-print taken by himself from appellant and that it was made by appellant. Some time later the prosecution offered in evidence fingerprints upon a card found in the identification bureau of the police department and bearing the name of appellant. The expert testified, over the objections of appellant, that he had examined this card as a part of the investigation leading up to the arrest of appellant and that a thumb-print upon it was made by the same thumb which made the print on the metal bar and the one taken by him from appellant after his arrest. The fingerprints on the card were taken at some time before the burglary was committed with which appellant was charged and for which he was convicted in the present action. The card was admitted in evidence over the objection of appellant. This was error. The exhibit was offered merely because it was inspected by the finger-print expert during the investigation which preceded appellant's arrest. It was not admissible for that reason, nor can we conceive of any other ground upon which it was entitled to a place in the record, and it demonstrated to the jury that appellant once before had been in the hands of the police."

From the above it appears that the United States Attorney had other exemplars from which to choose to prove the disputed signature on the lease; that there was no necessity to use said fingerprint card containing said prior criminal record.

The introduction of said fingerprint card was most detrimental. It showed that he was arrested by the Government for a similar offense, taken into custody and fingerprinted. No disposition of the case was shown. It must be remembered that the case at bar was a close one. The jury disagreed on the seventh count of the indictment. They returned a verdict on the other six counts, charging in effect the possession of a still, and manufacture. In view of the prior record on said fingerprint card the jury in arriving at its verdict must have been influenced thereby. It is apparent that the defendant was prejudiced by such evidence.

V.

FIFTH GROUND FOR REVERSAL.

MISCONDUCT OF COURT AND UNITED STATES ATTORNEY AND ERROR OF COURT IN REFUSING TO INSTRUCT JURY IN CONNECTION WITH SUCH MISCONDUCT.

(Assignments of Error 13, 13-A-B-C; Tr. 30-44.)

For convenience these assignments will be consolidated and argued together.

The following is one assignment which has within it all the errors assigned. For brevity we are incorporating it at length herein instead of setting out each assignment separately.

> "Agent DeKalb testified:
>
> 'MR. GOULDEN. Q. What did you find on the defendant when you made a search of the defendant?

MR. PERRY. For the purpose of the record, your Honor, and in order to preserve the rights of my client, I must object upon the ground that any testimony that this witness is going to give in this particular respect violates the constitutional rights of the defendant, particularly with respect to the Fourth and Fifth Amendments; on the further ground that there was a hearing before the United States Commissioner, a motion to suppress was filed upon the complaint before the Commissioner, and that the case was dismissed before the Commissioner, and an order by Judge Kerrigan was made directing the return of certain papers. The testimony that this witness no doubt intends to give now in all probability relates to those documents which were ordered returned. I make that statement as a preliminary statement to my objection. I object on those grounds.

MR GOULDEN. There is no question the documents were returned. The Government does not make any contention that they were not returned. There is nothing in the order that says they were never seized or that there were no such papers. The Government certainly has the right to show that such papers existed. The order, itself, apparently would show that, but I think we are entitled to show what those papers are.

MR. PERRY. I take an exception to counsel's statement as to the extent of his rights. There is an objection before your Honor.

THE COURT. This court has to decide at this time whether the evidence as such would warrant its reception. I presume that the order was predicated upon certain hearings. I don't know whether you are getting into a situation

where you are proposing to offer something that should not be offered. It is only by subsequent testimony that the Court can be satisfied that it was or was not proper. I will have to know, and I do not recall it now if it was ever before me, as to whether this defendant was properly arrested so as to warrant the reception of this evidence.

MR. PERRY. I wish to make the further objection, since your Honor has not ruled at the present time, upon the ground that the documents, themselves, that they took from the defendant Rocchia, are the best evidence.

MR. GOULDEN. There is no question about that, your Honor, and if the defendant desires to produce them we will be glad to use them.

MR PERRY. I object to that as an improper remark by counsel.

THE COURT. I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce, for instance. Of course, if it is something that should not properly be before the Court that is another situation. So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest, and a defendant under arrest can be searched if properly arrested.

MR. PERRY. I want to renew my objection to Mr. Goulden's statement calling upon the defendant to produce certain documents, because it is in effect calling upon him to testify against himself. I assign the remarks of counsel for the

Government as prejudicial misconduct, and I instruct your Honor to direct the jury to disregard them.

THE COURT. The Court refuses to receive the instruction.

MR PERRY. I am sorry I said that word, your Honor, I didn't intend to. I object to counsel's remarks in calling upon the defendant to produce certain documents, because he is in effect calling on him to testify and it is prejudicial misconduct on his part, and I ask your Honor to instruct the jury to disregard the remarks of the United States Attorney.

THE COURT. The objection will be overruled.

MR. PERRY. And, furthermore, with all due respect to your Honor, I take an exception to your Honor's remarks. Your Honor stated that the Government had the right to call on the defendant by subpoena or otherwise to produce certain documents. I assign the remarks of your Honor as misconduct.

THE COURT. I don't recall any such statement on the part of the court; I said nothing about a subpoena. If you will examine the record I think you will find that that is in the vaporings of your imagination, Mr. Perry.

MR. PERRY. I ask your Honor to instruct——

THE COURT. You will find that I didn't suggest any subpoena or any other action.

MR. PERRY. You stated he could call on the defendant to produce certain documents.

THE COURT. The objection will be overruled.

> MR. PERRY. I take an exception, your Honor, both with respect to the ruling as to Mr. Goulden and also with respect to yourself.' " (Tr. 118-122.)

The errors in connection with the above may be summarized as follows:

1. Misconduct of United States Attorney.

2. Error of Court in connection with misconduct of United States Attorney.

3. Misconduct of court.

4. Error of court in connection with its own misconduct.

The statement by the District Attorney "Mr. Goulden * * * if the defendant desires to produce them we will be glad to use them" in referring to the documents taken from the defendant Rocchia is in effect a challenge to the defendant to produce the said records. (Tr. 43.)

The statement by the court "he can demand any documents proper to be introduced by you. If he is demanding them it is true that he has not gone through the formality of a notice to produce, for instance * * *" (Tr. 43) in referring to the remarks of the District Attorney, is not only a condoning the District Attorney's remarks, but it in effect amounts to republication of them.

Such conduct on the part of the District Attorney and the court, has been expressly denounced and held to be prejudicial to the rights of the defendant in

McKnight v. U. S., C. C. A. 6, 115 Fed. 972, 977. In the *McKnight* case the record disclosed the following:

"Q. Will you please read that paper?

(Question objected to by the defendant.)

BY THE COURT. The paper from which this was taken was last found in the possession of the defendant. Now, if the district attorney chooses, he can demand the production of that paper.

MR. HILL. I do demand that paper.

THE COURT. Is it produced, or is it desired to produce it, by the defendant?

COL. BRECKINRIDGE. We deny the right of the district attorney to make the demand.

BY THE COURT. That, of course, is involved in your objection. The question is, do you produce it?

COL. BRECKINRIDGE. We want to save exception to your honor's suggestion.

THE COURT. You can reserve any exception you please. The court rules this can be received as secondary evidence only after a demand has been made for a production of the original. The district attorney has demanded, in the presence of the court, the original paper.

COL. BRECKINRIDGE. The defendant first excepts to the demand being made now, as not being legal; second, there is no such paper in his possession.

THE COURT. That is not the question. You do not produce the paper?

COL. BRECKINRIDGE. In answer to the demand of the district attorney, counsel for the defendant announce that there was no such paper in existence. Therefore, it never was in his

possession, and no such demand can be complied with.

BY THE COURT. The essential thing is, you decline to produce it.

COL. BRECKINRIDGE. No, sir; 'declining' means we have the power to do so.

THE COURT. Oh, no.

COL. BRECKINRIDGE. I should think it does.

THE COURT. You decline to produce it. The defendant failing to produce the paper upon the demand of the district attorney, this can be offered.

COL. BRECKINRIDGE. We desire an exception to your honor's ruling that the district attorney has a right to demand a production of the paper from us.

THE COURT. The court does not rule anything, except to inquire whether the district attorney has made this demand. The court says it cannot allow the contents of that paper to be presented unless the proper foundation has been laid by a demand for the production of the original. The district attorney, as I understand it, has made this demand now for the production of the original paper, which was last heard of in the possession of the defendant. That demand not having been complied with, the court rules that this paper may be read.

COL. BRECKINRIDGE. To that the defendant excepts. We desire to go further, and not merely to except, but to say in answer to that demand that there was no such paper ever in the possession of the defendant, and therefore he does not decline to deliver the paper, but answers that there is no such paper to deliver.

THE COURT. That is a question of proof, entirely. Counsel cannot testify for the defendant.

COL. BRECKINRIDGE. No one can make answer for the defendant but the defendant himself.

THE COURT. He can testify in rebuttal to this proposition.

COL. BRECKINRIDGE. He can do more than that, and we object to the statement as to his right to testify.

THE COURT. I did not mean he could testify in person, but he can introduce testimony in rebuttal of the proposition.

(And thereupon the jury were told by the court to disregard the statement first made.)

COL. BRECKINRIDGE. A demand is made in the presence of the jury and the defendant simply answers the demand which, under the permission of the court, and in the presence of the court and this jury, the district attorney has made.

BY THE COURT. The court makes no suggestions, except as stating the rule of law in regard to proof by secondary evidence of the contents of this paper on the part of the United States. The rule of law is perfectly familiar to counsel, as well as to the court, that secondary evidence cannot be produced unless the original is accounted for, and the foundation for the introduction of secondary evidence is laid, which is well understood to be a demand on the party in whose possession the paper was last seen to produce it. Then, if that paper is not produced, the question is concluded, or evidence can be heard on one side or the other as to whether the

paper was ever in existence; and that is a matter for the jury to determine after hearing all the testimony."

The Sixth Circuit in holding that the comments with reference to the production of the paper by the defendant constituted reversible error, said at page 981:

> "A perusal of the decisions of the supreme court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself. The right to such protection existed at the common law, and was carried into the constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment. In the present case the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document which it was alleged contained the corrupt agreement which was the basis of the note given by irresponsible persons for the funds of the bank by McKnight's direction. The production of such a paper would have been self-criminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before the jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury

advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this procedure was an infraction of the constitutional rights of the accused, within the meaning of the fifth amendment to the constitution. Recurring to the opinion of Mr. Justice Bracley in the Boyd Case, supra, we may quote:

'It may be, it is the obnoxious thing in its least repulsive form; but illegitimate and constitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be legally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the court to be watchful of the constitutional right of the citizen, and against any stealthy encroachments thereon. Their motto should be, "Obsta principiis".' "

See, also, *Gillespie v. State*, 115 Pac. 620, 35 L. R. A. (N. S.) 1171.

The District Attorney after having learned that certain letters were in the possession of the defendant, then and there, in open court asked the defendant and his attorney to produce them. Upon exception being taken thereto the District Attorney withdrew and corrected the state's request and thereupon called upon the attorney for the defendant to produce the letters. The defendant excepted and in connection

with the prejudicial effect of said demand the court held:

> "It is true that making a demand upon a defendant to produce such letters or papers is a different thing from forcing him to produce them; but the effect is the same, because if a defendant refuses to comply with such a demand it is equivalent to admitting that the evidence demanded would incriminate him, if it were produced. The observation and experience of all practising attorneys will sustain the statement that such an inference is more damaging to a defendant than a proven fact would be. When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminate himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon.
>
> We are sustained in these views by the case of *McKnight v. United States,* 54 C. C. A. 358, 115 Fed. 972. * * *
>
> For the error above pointed out, the judgment of the trial court is reversed, and the cause is remanded for a new trial." (35 L. R. A. (N. S.) at pages 1173 and 1174.)

All the Government had to do was to show that the documents were in the defendant's possession. It was not necessary, as in civil cases, to make demand either in open court or by notice.

Lisansky v. United States, 31 Fed. (2d) 846 at 850.

When the Government goes beyond this step it enters into the field of error. This is what the United States Attorney did when he said, "If he wants to produce them we will be glad to use them". He was then and there calling on defendant to testify and this comment tended to and did create a presumption against the defendant for his failure to produce said paper. In this connection in *Wilson v. United States,* 149 U. S. 60, at 67, it was held:

> "It should have been said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify."

The court in the case at bar did not admonish the United States Attorney that he was forbidden to make any such comment, and not only refused to instruct the jury to disregard his remarks but then and there stated in the presence of the jury that "he (U. S. Attorney) could demand any documents proper to be introduced by him (defendant)". When the court's attention was called to this additional error and was requested to instruct the jury to disregard it the court refused to so instruct.

The court was then and there duty bound to instruct the jury promptly and in no unmistakable terms. A failure to do so was prejudicial error.

In *Wilson v. United States,* 149 U. S. 60, at 66 and 67, it was held:

> "When the District Attorney, referring to the fact that the defendant did not ask to be a

witness, said to the jury, 'I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime,' he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness. And when counsel for defendant called the attention of the court to this language of the District Attorney it was not met by any direct prohibition or emphatic condemnation of the court, which only said: 'I suppose the counsel should not comment upon the defendant not taking the stand.' It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.

Instead of stating, after mentioning that the United States court is not governed by the State's statutes, 'I do not know that it ought to be the subject of comment by counsel,' the court should have said that any such comment would tend necessarily to defeat the very prohibition of the statute. And the reply of the District Attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: 'I did not mean to refer

to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf,' which was equivalent to saying, 'You gentlement of the jury know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it.' *By this action of the court in refusing to condemn the language of the District Attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that if he were an innocent man he would have gone on the stand as the District Attorney stated he himself would have done.*"

In the case at bar the court not only failed then and there to instruct the jury to disregard the comments of the United States Attorney, but made it more impressive by saying that the United States Attorney could demand any documents proper to be introduced by the defendant, which itself was error, and for which the court likewise refused to instruct the jury to disregard. (Tr. 118-122.) The court in *Wilson v. United States,* (supra), at page 68, said as follows:

"The refusal of the court to condemn the reference of the District Attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should

> be corrected by setting the verdict aside and awarding a new trial."

In *De Mayo v. United States*, 32 Fed. (2d) 472 (C. C. A. 8.), it was held as follows:

> "Lastly, error is assigned to the statement of the United States Attorney in argument, calling attention in an indirect, but very damaging way, to the fact that De Mayo had failed to take the stand."

The objectionable statement was that the District Attorney pointed to the defendant and stated "that he sat silently in his seat and allowed this poor innocent girl to take the stand and tell what happened out there that night in the house". After due objection the court stated "that if there was any reference to the defendant keeping his seat, of course that is improper argument and it will not be considered by the jury and they will be instructed not to consider it".

In commenting on the failure of the trial judge to promptly and emphatically admonish the jury to disregard the statement the court at page 475 said:

> "Such reference is reversible error unless the court sharply, emphatically, and promptly advises the jury that the matter is improper and that they should give no consideration thereto. This should be done in unmistakable and positive terms. To that extent, at least, if not to a greater extent, counsel should be rebuked. This is one of the most damaging acts on the part of a prosecutor that can be committed in the course of a trial, not only from the standpoint of the defendant, but be-

> cause of its effect upon the case generally, and should not be condoned. We do not think the court in this case dealt strongly enough with the situation.
>
> *   *   *   *   *   *   *
>
> It follows that the judgment below must be reversed and remanded, * * *"

It will be seen from this that indirect reference is not permitted.

In *Barnes v. United States,* 8 Fed. (2d) 832, at 834 (C. C. A. 8) it was held:

> "Error is next assigned on behalf of both defendants because of a statement made by the prosecutor, Higgs, in argument. He said:
>
> 'The witness Pryor took the stand and testified he bought dope from these defendants, and not a human being has testified that in so testifying Pryor lied.
>
> MR. HARVEY. I object to that as an incompetent statement.
>
> THE COURT. Yes, that is improper, Mr. Higgs, under the circumstances in this case.
>
> MR. HARVEY. And it is a statement that is prohibited by law, under the statute.
>
> THE COURT. Yes; that is true.
>
> MR. HIGGS. I take it that that is a state statute. I would like to show you——
>
> MR. HARVEY. It is a clear and unquestioned reference to the fact that none of the defendants took the stand, but saw fit to stand upon the government's testimony——
>
> THE COURT. The court rules that it is improper.

MR. HARVEY. Such a statement as that, your honor, makes unlawful the further hearing of this cause, after a statement of that kind is made to the jury here, and I move now the discharge of this jury, on the ground that that statement has disqualified them.

THE COURT. The court refuses to accede to that request. He did not say anything about the source of this evidence; not one word or syllable did counsel mention about the source of this matter; so it is only by inference that you get your objection sustained, at all. I am sustaining it fully, but the reference of counsel was only——

MR. HARVEY. Of course, a direct statement sometimes is stronger than an inference; but an inference may be as strong as a direct statement. I think that is the case here, that the defendants——

THE COURT. Nobody has mentioned the defendants but you, and you have just done that this second. The court is saying that it was highly improper for counsel for the government even to make the hint that you now have come out and cleared up. That is so far as the court is going in the matter.

To which ruling of the court the defendants, by their counsel, then and there at the time duly excepted.'

This assignment presents a serious question. The defendants had not testified in their own behalf. The court promptly declared the statement to be highly improper. He did not, however, charge the jury to disregard its effect, and refused to accede to the demand of counsel that the jury be discharged. The colloquy that ensued un-

> doubtedly emphasized and made prominent the potential application of the language used. We feel, therefore, constrained to hold that prejudicial error was thereby committed. * * * It follows, accordingly, that the case must be reversed and remanded for a new trial."

The colloquy that ensued in the case at bar undoubtedly emphasized and made prominent the potential application of the language used. The court repeated that the United States Attorney had a right to call for the papers and utterly failed to instruct the jury.

See also

Volkmor v. United States, 13 Fed. (2d) (C. C. A. 6) 594, Par. 1;

Tingle v. United States, 38 Fed. (2d) 573, at 576 (C. C. A. 8), Par. 8.

It will be noted that there was quite a discussion upon the part of the court in insisting that the United States Attorney could demand any documents proper to be introduced by the defendant. The jury was no doubt impressed with refusal of the court to instruct them to disregard not only the remarks of the United States Attorney but its own remarks. This was no doubt an unusual procedure with them. The jury listens attentively to every word and action of the court, especially on matters in dispute. It is most reasonable to conclude that the jury inferred that the United States Attorney was entitled to such original papers from the defendant and by his failure to produce them he was withholding something material to the case. It was a case then of either producing the

original or standing thereafter condemned in the eyes of the jury for withholding records from their consideration.

The only way the error could have been remedied was for the court then and there to instruct the jury in each instance as requested by the defendant. This was not done. We have previously shown that these papers were of such a nature that the introduction of the photostatic copies in evidence (U. S. Exhibits 7 and 8) was also prejudicial error.

VI.

SIXTH GROUND FOR REVERSAL.

ERROR OF COURT IN ADMISSION OF STATEMENTS MADE BY AND BETWEEN INVESTIGATORS BURT AND GOGGIN IN PRESENCE OF DEFENDANT.

(Assignments of Error 8, 9, 10, 21, 36, 38; Tr. 23, 26, 68, 69.)

The testimony in these assignments shows that on January 9, 1933, at 8:10 p. m. while Investigator Burt was in the still room defendant Antonio Rocchia entered, and was thereupon placed under arrest. Investigator Burt then and there searched said defendant and found a wallet with a number of papers and a quantity of currency, together with a purse containing currency. Investigator Burt kept the papers and handed back to Rocchia the wallet and small purse. About 10:00 p. m. Investigators De Kalb and Goggin returned to said still premises and found Antonio Rocchia in the custody of Investigator Burt.

Goggin walked over in front of defendant Rocchia who was seated on a yeast box and looked down and said to Investigator Burt, "It looks like you have the Big Shot", and Investigator Burt answered saying, "Yes, it looks as if I have, search him and see what you think". (Tr. 144, 5.)

The purpose of the objectionable testimony was to show what the defendant did under the circumstances. The general rule in this connection is as follows:

> "The doctrine of silence as an admission, broadly stated, is as follows: 'If. A, when in B's presence and hearing, makes a statement to which B listens in silence, interposing no objection, A's statement may be put in evidence against B whenever B's silence is of such a nature as to lead to the inference of assent. Silence under such an accusation is a circumstance to go to the jury on a question of guilt or innocence of the person who remains silent, and is a presumption of his acquiescence in the truth of the statement. Such statement may be made by the prosecuting witness; or by an accomplice; or by one of two persons acting in concert."
>
> *Wharton's Criminal Evidence,* 10th Ed. Vol. II, Sec. 679.)

This general rule is subject to certain limitations which are as follows:

> "The doctrine, then, of acquiescence by silence or conduct, is subject to the following limitations: * * *
>
> Fifth, the statement or accusation must be direct, and of a character that would naturally call for action or reply, and must relate to the particu-

lar offense charged, and must be addressed to, and intended to affect, the accused, and not arise in conversation or discussion between third parties."

Wharton's Criminal Evidence, Tenth Ed. Vol. II, Sec. 680.)

It is not every statement made in defendant's presence that is admissible.

In *McCarthy v. U. S.,* 25 Fed. (2) 298 at 299 (C. C. A. 6), it was held:

"This was error. Where accusatory statements are made in the presence of a respondent and not denied, the question whether his silence has any incriminating effect depends upon whether he was under any duty or any natural impulse to speak. Sometimes or often, in the earlier stages of the matter, there may be such a duty or impulse; but, after the arrest and during an official examination, while respondent is in custody, it is common knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'If you say anything, it will be used against you; if you do not say anything, that will be used against you.' See comments of Shaw, C. J., in Com. v. Kenney, 12 Metc. (53 Mass.) 235, 46 Am. Dec. 672; Com. v. Walker, 13 Allen (Mass.) 570; Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; Porter v. Com. (Ky.) 61 S. W. 16, 17 and citations; State v. Weaver, 57 Iowa 730, 11 N. W. 675.

Also comment by Judge Learned Hand in Di Carlo v. United States (C. C. A. 2), 6 F. (2d) 364, 366. In Price v. United States (C. C. A. 6) 5 F. (2d) 650, the evidence of the accusatory statement and respondent's silence was received without objections, and it was not reversible error thereafter to refuse to strike it out.

We are satisfied that this error cannot be disregarded as nonprejudicial under section 269 of the Judicial Code (28 U. S. C. A. Section 391). We cannot say that it was not the element which turned the scales when the jury decided whether to believe the respondents, who later, as witnesses, denied all connection with the supposed offense.

The judgments must be reversed, and the cases remanded for a new trial."

In *Di Carlo v. United States,* 6 Fed. (2) 364, at 365 and 366, paragraph 1 (C. C. A. 2), it was held:

"At the police station that same night Pattitucci identified all four of the men before a number of witnesses, who so swore. The admission of this evidence, if incompetent, would, we think, in so close a case be a serious error.

The argument of the prosecution in support of these declarations will scarcely stand. They suggest that, as they took place in the presence of the defendants, they were admissible. But this is true only in cases where the trial judge with some warrant believes that from the conduct of the defendant after hearing himself identified a reasonable inference of acquiescence may be inferred. Christies Case (1914) A. C. 545; State v. Claymonst, 96 N. J. Law, 1, 114 A. 155. It is

a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him. While the question is a delicate one, dependent largely upon the discretion of the trial judge, nevertheless more must appear than that the defendant heard the statement. We think that the evidence of how the defendants met Pattitucci's accusation in the police station was plainly not enough to admit the identifications as admissions."

In *People v. Smith,* 64 N. E. 814, at 820, 1st column, it was held:

"It also admitted the evidence of the witness Emily Bugbee of the alleged statements of the defendant, not amounting to or including an admission of any fact relating to the homicide, but which related only to a mere newspaper report, apparently inspired by the witness to the effect that, although she had informed the defendant that the decedent could not talk, she had said to a newspaper reporter that the decedent had declared that he (the defendant) did it, and to which he added that she must have been mistaken, as his wife must have been calling for him. We are aware of no rule of evidence under which this proof was properly admissible. The learned trial judge was obviously of the opinion that the presence of the defendant rendered proof of everything that occurred or did not occur absolutely admissible, without regard to its character, by whom it was said, done, or omitted, or to the circumstances or conditions under which the acts or omissions of the decedent or of the defendant occurred. In that we think he was in error."

The court further held that evidence of party's conduct in response to questions is dangerous and should be received with great caution and in *People v. Smith* (supra), at page 820, 1st and 2nd columns, the court stated as follows:

> "The only possible ground upon which the silence of a party can be admitted as evidence against him is that it amounts to an acquiescence in a statement or act of another person. The rule admitting such evidence is to be applied with careful discrimination. *Such evidence is most dangerous, and should be received with great caution,* and not admitted unless of statements or acts which naturally call for contradiction, or unless it consists of some assertion with respect to his rights in which, by silence, the party plainly acquiesces. To have that effect, his acquiescence must be exhibited by some act of voluntary demeanor or conduct. If the claimed acquiescence is in the conduct or langauge of another, it must plainly appear that such conduct or language was fully known and fully understood by the party, before any inference can be drawn from his passiveness or silence."

The court in *People v. Smith* (supra), also held that if there is any doubt as to whether or not a reply should be made, the evidence should not be received, and at page 820, 2nd column, stated as follows:

> "The circumstances must not only be such as to afford him an opportunity to act or speak, but such as would ordinarily and naturally call for some action or reply from persons similarly situated. *If the condition be one of doubt as to*

whether a reply should have been made, the evidence should not be received."

From the above rules it appears that the statement to be admissible must be addressed to and intended to affect the accused. The statement in question was not addressed to the accused. The evidence shows that Investigator Goggin had the conversation with Investigator Burt. (Tr. 132.) There was no doubt from the tenor of Goggin's statement that it was intended that Burt should reply and not the defendant Rocchia. This is borne out by the nature of Investigator Burt's reply when he said to Goggin, "search him and see what you think." This clearly was an invitation to Goggin to search the defendant and Rocchia must have so considered it. It would have been futile to protest in either event. He had already been searched by Investigator Burt, and to him it meant submission to further search. Furthermore, as the record appears, the reply by Burt to search the defendant followed naturally from the statement by Goggin when he said, "It looks like you have the Big Shot." How could it be said that Rocchia should have replied when he was not even considered a party to the conversation? So far as the investigators were concerned that was a matter between them. Rocchia just merely served as a subject of conversation and then only in a very general way. It cannot be said that the question was such as would naturally call for a reply.

The defendant is not bound by statements arising in a conversation or discussion between third persons. (*Wharton's Criminal Evidence,* supra.)

Investigator Goggin saw Rocchia for the first time. He was, in fact, a mere stranger to any of the circumstances surrounding the entry and arrest of Rocchia. He knew nothing. When Goggin said, "It looks like you have the Big Shot," it was not said by reason of facts within Goggin's knowledge. Being without any such knowledge and a mere stranger, Rocchia was justified in ignoring the remarks. Furthermore, the statement of Goggin's was not made in the routine examination but was spontaneous and made promptly upon his entry. The conversation was clearly between those two persons and therefore Rocchia was not called upon to answer.

In *Commonwealth v. Kenny,* 12 Metcalf 235, 46 Am. Dec. 672:

> "Indictment against defendant for stealing a bag and some silver and copper coin, the property of one Russell. At the trial one Brewer testified that he was a keeper at the watch-house in Boston; that on the evening of September 5, 1846, two watchmen came in, bringing the defendant; that one of them said, 'Here is a man who has been robbing a man' * * *"

As to admissibility of evidence the court held as follows:

> "If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury and alike inconsistent with decorum and the rules of law. So, if the matter is something not within his knowledge, if the statement is made by a stranger, whom he is not called on to notice; or

> if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from the silence. * * *
>
> The declaration made by the officer, who first brought the defendant to the watch-house, he had certainly no occasion to reply to. * * * New trial granted."

In *State v. Young,* 12 S. W. 879, at 881, paragraph 2, it was held:

> "There was error in admitting testimony as to what Craft said to Wilson, the marshal, to-wit:
>
> 'You have got your right man; you don't have to go any further to get him.' There are two reasons why the ruling was erroneous: (1) Because the defendant was under arrest, and therefore in no position to make any denial as to what Craft said in his presence. (Authorities cited); (2) Because the remark was made by a mere stranger in his presence, and not to him. (Authorities cited.) The defendant had the right, therefore, to treat the remark of Craft as mere impertinence and best answered by silence. * * * Judgment reversed."

Investigator Burt, at the time he arrested and searched the defendant, was waiting for the return of Investigators Goggin and DeKalb. When he returned the money, wallet and purse to the defendant it was no doubt his intention to have the other agents search him upon their return. It is significant to note that when the agents did return Goggin made the search and DeKalb counted the money. This was undoubtedly

done with the idea in mind that should they be called upon to testify that each of them would be able to say what was found and by repetition as each investigator took the stand, make the testimony more impressive in the minds of the jury. This was a clever way of building up evidence. When Goggin entered the still room and said to Burt, "It looks like you have the Big Shot," the natural reply was from Burt, who said, "Search him and see what you think," and he did. Rocchia was not part of this conversation nor was he intended to be. When the investigators did take the stand each of them repeated the conversation between Burt and Goggin as well as testifying as to what they found and with each repetition it gained greater significance and became more forcibly impressed in the minds of the jury. It was repeated solely for the purpose of influencing the jury in its deliberations upon the question of the defendant's guilt. Even with it all, there was some doubt in the minds of the jury as to the guilt of the defendant for they disagreed on the seventh count of said indictment charging conspiracy. (Tr. 7.) They returned a verdict of guilty on counts one to six, inclusive, charging generally possession of still and manufacturing. The statement of Investigator Goggin that "It looks like you have the Big Shot" no doubt was taken by the jury to mean that he was the operator of this particular still, and the man in possession and control thereof.

The question of the conduct of the defendant in relation to the statements made in his presence is a

delicate one and something more must appear than that Rocchia heard the statement. In *Di Carlo v. United States*, 6 Fed. (2) 364, it was held:

> "While the question is a delicate one, dependent largely upon the discretion of the trial judge, *nevertheless more must appear than that the defendant heard the statement.*"

A person on trial for his liberty is entitled to all the advantages which the laws give him and among them is the right to have his case submitted to an impartial jury upon competent evidence.

Having in mind the rules laid down above it is apparent that Investigator Goggin had no knowledge of the facts surrounding the arrest and search of the defendant Rocchia; that the statement was not based on a fact within the knowledge of Investigator Goggin but was purely a spontaneous assumption; that it was not addressed to the defendant; that it did not relate to the offense charged and arose in a conversation by and between third persons. Surely this statement was not properly admitted and under the circumstances it cannot be said that it was not the element which turned the scales.

In connection with this remark of Goggin's "It looks like you have the Big Shot," it must also be remembered that the fingerprint card (U. S. Exhibit 14) contained a prior criminal record, the disposition of which was not shown. The jury undoubtedly concluded that the defendant was an habitual offender and was no doubt the so-called "big shot" or owner and proprietor of the still.

In this connection it is also well to note the remarks of the United States Attorney in calling upon the defendant to produce certain papers (U. S. Exhibits 7 and 8) and the comment by the court that it was proper so to do. In view of these statements the failure of the defendant to produce such papers certainly influenced the jury in believing that the defendant Antonio Rocchia was the proprietor of the still or had some direct connection therewith. It is apparent that in the light of the facts of this case the defendant was prejudiced by the statement of Investigator Goggin when he referred to the defendant as the "big shot."

We respectfully submit that the verdict of the lower court should be reversed.

Dated, San Francisco,
May 27, 1935.

George J. Hatfield,
Frank J. Perry,
Attorneys for Appellant.

No. 7829

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONIO ROCCHIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

JUN 15 1935

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No. 7829

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONIO ROCCHIA,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF CASE.

This is an appeal by Antonio Rocchia, hereinafter designated "appellant", one of three defendants named in an indictment returned by the Grand Jury of this District on November 14, 1933 and charging, in the first six counts thereof, violations of the Internal Revenue laws,* and in the Seventh Count,** conspiracy to violate said laws, to-wit, to unlawfully

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*R. S. 3258 (26 U. S. C. 281); R. S. 3259 (26 U. S. C. 282), R. S. 3260 (26 U. S. C. 284); R. S. 3281 (26 U. S. C. 306); R. S. 3282 (26 U. S. C. 307).

**R. S. 5440 (18 U. S. C. 88).

possess and operate a distillery in violation of the Internal Revenue laws of the United States and to manufacture, possess and sell intoxicating liquors in violation of the National Prohibition Act. As to this latter count the jury was unable to reach an agreement. The appellant Rocchia, the only defendant on trial, was convicted on the first six counts of the indictment.

QUESTIONS PRESENTED.

(1) Was appellant's Motion to Suppress Evidence properly denied by the District Court, and

(2) Did the appellant have a fair and impartial trial?

THE FACTS.

From the testimony as evidenced at the hearing on the Motion to Suppress Evidence (Tr. 80 to 87 inc.) and at the trial hereof, the facts may be summarized as follows: On January 9, 1933, William P. Goggin, John M. Burt and Keith De Kalb, Investigators of the Department of Justice, made an investigation of the premises in question and known as 60 Brady Street in San Francisco, after Investigator Goggin informed the other two officers that he had just received information from a reliable source that a distillery was unlawfully in operation at said address. Their investigation centered on these premises at

about 4:30 in the afternoon of that day. As the officers approached the building they each observed a strong odor of fermenting mash and distillation which became stronger as they neared the building; that as they neared the building they also observed the hum of motors and the roar of a gas burner operating under pressure; that the officers had each had previous experiences in investigating and seizing illicit distilleries while in operation and arresting the operators thereof, and that from this experience coupled with the smell and sounds emanating from the building they knew that a distillery was in operation therein. They further testified that the building was a concrete warehouse type structure approximately 50 feet wide by 100 feet deep; that it bore a sign to the effect that the premises were being used in a drayage business, and that there was no sign evidencing it to be a licensed distillery as required by law;* that before entering the building they went down the first street intersecting Brady Street which put them in a way alongside of the building and to the rear thereof; that the front of the building contained a large sliding door in the center of the building through which trucks or other large vehicles might enter or leave, and that close by was a small doorway. They further testified that the large sliding door was not locked nor fully closed; that looking through the window in that large door the officers could observe a partition stretching across the building approximately 25 feet back of

---

*(R. S. 3279; 26 U. S. C. 303).

the entrance, which partition appeared to contain another large doorway, almost totally obscured by a pile of cartons in front thereof, and through the top portion of this doorway they could observe that the portion of the building back of the partition was lighted. They also observed that the portion of the building between the street and the partition just mentioned was likewise sub-divided by a partition running from the front of the building back to the partition separating the lighted portion of the building.

The officers entered the building through the sliding door and entered the distillery portion of the building by way of doors two and three as shown in Exhibit 1, these doors leading respectively through the two partitions mentioned in the front portion of the building, and found a large alcohol distillery in full operation and arrested the operator, Frank Ferrari. At the time of the arrest the distillery was comprised of a 500 gallon still and a 250 gallon still, and was capable of producing between 500 and 1000 gallons of alcohol per day; that the distillery likewise contained aside from the ordinary machinery, hoses, vats, etc. approximately 30,000 gallons of corn sugar mash and 1000 gallons of alcohol and whiskey.

About 6:00 oclock on the same evening one Silvio Cappi entered the building with the use of a key through the small front door and was proceeding towards the portion of the building wherein the stills were located when he was arrested by the officers. The key found on his person fitted the door to the building and was identical with that found on defend-

ant Ferrari (Exhibits 4 and 5). Shortly thereafter two of the officers left with their prisoners, and investigator Burt remained in charge of the seizure. He left the lights of the distillery burning and left a blower or fan in operation. About 8:10 o'clock of that evening and while he was in the front portion of the building, which was in darkness, he observed a man on the sidewalk and heard him insert a key into the lock of the small door and saw him enter the building and proceed to the rear where the distillery was located. He was arrested by officer Burt and questioned and searched in the distillery and found to have a key (Exhibit 6) identical with Exhibits 4 and 5, together with numerous documents and a large quantity of currency. This person was appellant, who at that time gave the name of John Caruso, although documents were found in his possession which would indicate that his true name was Antonio Rocchia. Investigator Burt retained all documents but returned the currency to appellant. From the time of his arrest until the return of Officers Goggin and De Kalb, appellant sought to obtain his release from Investigator Burt by the payment of money, making various offers until he had offered all but $50 of approximately $1600 found on his person. He offered, also, to make regular payments for protection thereafter. Appellant was questioned by the officers prior to leaving the distillery and refused to answer any questions other than to say that his name was John Caruso and to deny that he had any connection with the still. He also stated that he met a man on Third Street who gave him the

key and told him that he might find a job at these premises although he did not claim to know what kind of a job it might be (Tr. 127).

The evidence shows that the premises were rented to a man who gave the name of Joseph Rossi by one William Elligeroth, an employee in the real estate office of Sam McKee & Co. The owner of the building, Axel L. Thulin, identified Exhibit 13 as his copy of the lease for said building covering the period when the distillery was seized. The evidence further shows that Mr. Elligeroth negotiated the lease for him, and that the lease when presented to him by the real estate company for signature had already been signed by the lessor whom he had never met. He further testified that all payments, under the terms of the lease by lessor, were made to him through the real estate company, that he never saw appellant and knew nothing of what was going on at the building inasmuch as he had not visited it subsequent to its being leased through Elligeroth.

Inspector Van Husen of the San Francisco Water Department, testified to having placed a note under the door of 60 Brady Street when he was unable to obtain the attention of any one inside by knocking at the door, and that a photostatic copy of the note he left at the building is a part of Exhibit 7.

Emil J. Canepa testified that he is a Deputy United States Marshal; that he has acted as an Italian Interpreter both in and out of court, and that he is qualified to interpret the Genovese, Piemontese and Lucchese dialects; that he examined the third sheet of Exhibit 7

and testified that it was in the Italian language and that he had made a true and correct translation thereof into the English language, which translation was introduced in evidence as U. S. Exhibit 11. This is the document which shows large payments for sugar, rent, etc. including the sum of $300 to "police".

George W. Poultney, representing the bonding company which wrote the bail bond for appellant in the lower court testified as to the bond (U. S. Exhibit 12); that he knew appellant Rocchia, and appellant, through his counsel, conceded that it was his signature on said bond.

Ernest E. Williams, United States Commissioner for this District, testified to the filing of the Commissioner's Complaint with him against appellant under the name of John Caruso, and two others; that a hearing was had before him on January 25, 1933 (Tr. 154) but that no holding or other ruling was made because of the request of counsel for appellant and his co-defendants that they be permitted to file a Motion to Suppress Evidence, and that subsequently, and on January 28, 1933, the then United States Attorney consented to the dismissal of appellant and Cappi, and requested a holding of the defendant Ferrari and that this was done. He testified definitely that he made no ruling on a Motion to Suppress Evidence. This testimony was placed in the record because of requests made by appellant through his counsel and contentions made not borne out by the record.

Professor E. O. Heinrich testified that the signature Joseph Rossi appearing on the lease (Exhibit 13)

was in the handwriting of appellant and testified that the portion of Exhibit 7 showing payments of money for sugar, police, etc. was also in the handwriting of appellant. He likewise testified that the fingerprint on Exhibit 3 and the fingerprints on Exhibit 14 were the prints of one and the same man, Exhibit 3 being identified as the prints of appellant and Exhibit 14 bearing the signature of appellant. Appellant in this connection through his counsel stipulated to the qualifications of Professor Heinrich and particularly stipulated that he was qualified to testify as an expert on handwriting and fingerprints (Tr. 160). The expert further testified, on cross-examination, that each of the exemplars used by him was necessary in reaching his conclusion (Tr. 165-6).

ASSIGNMENT OF ERRORS.

The assignment of errors, covering some sixty-four pages of the transcript (15 to 79 inclusive), is made up of over fifty separate alleged errors. Appellant has reduced them in his argument, in the Brief, to six alleged grounds of error, viz.:

(1) Appellant's constitutional rights as embodied in the Fourth and Fifth Amendments were violated;

(2) Error in admission in evidence of photostatic copies of documents taken from person of appellant at time of arrest;

(3) Error in admission of memorandum left on premises by water inspector;

(4) Error in admission of fingerprint card (Exhibit 14);

(5) Alleged misconduct on the part of both court and the United States Attorney; and

(6) Error in admission of testimony of conversation of government investigators in presence of appellant.

ARGUMENT.

A very careful reading of the more than fifty assignments of error set out in the transcript shows only the following points raised thereby:

1. Violation of rights guaranteed by 4th and 5th Amendments to the Constitution;
2. Violation of *Best Evidence* Rule of evidence in admission in evidence of photostatic copies of documents taken from person of appellant;
3. Alleged misconduct of United States Attorney in agreeing with appellant that original documents were in possession of appellant;
4. Alleged failure of Court to instruct jury on alleged misconduct of United States Attorney;
5. Admission of alleged prejudicial evidence in use of fingerprint card bearing signature Antonio Rocchia.

I.

SEARCH AND SEIZURE.

The first assignment of error urged by appellant, in his Brief, is based upon an alleged violation of his rights as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, in that he claims that the government officers entered the premises involved, i. e. 60 Brady Street, San Francisco, without sufficient probable cause.

This necessarily raises two questions:

(1) Is appellant a proper person to question that entrance; and

(2) In any event was the officers' entrance to the building justified and warranted by the facts.

These questions were presented to the trial court by motion of appellant to suppress evidence on January 6, 1933 (Tr. 80), and subsequently, following oral argument and the filing of Briefs, the Motion to Suppress Evidence was submitted and denied by the trial court (Tr. 91-2); the order being predicated upon an Amended Motion to Suppress, filed subsequent to the hearing, the government making no objection to the amendment (Tr. 87 to 99 inc.).

Out of an abundance of caution the government before the trial court, in its argument to the court, and in its briefs, while openly contending that appellant is not a proper person to question the legality of the search, likewise presented to the court its argument and authorities in support of the legality of the search in any event.

Is Appellant a proper person to question legality of search of distillery premises.

At the outset it is well to call the court's attention to the Amended Motion to Suppress (Tr. 89), wherein appellant limited his interest to the personal property seized and disclaimed any interest in or to the premises entered.

> "That as a result of the search of said premises (60 Brady Street, San Francisco, California) said officers found certain properties which they seized. That said properties so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time the same was seized, as aforesaid. That as a result of the arrest of said Antonio Rocchia said officers found certain property, papers and effects in the possession of said Antonio Rocchia which they seized. That the entry, search and seizure as aforesaid were and each of them was and is illegal and in violation of the rights of Antonio Rocchia under the Fourth and Fifth Amendments to the Constitution of the United States; that said property so seized as aforesaid was the property of the defendant Antonio Rocchia and was in the possession of Antonio Rocchia at the time of its seizure."

It is to be noted that appellant in his Amended Petition to Suppress Evidence claims no interest whatever in or to the distillery premises described as 60 Brady Street, San Francisco, but rather specifically and particularly limits his interest to the documents found on his person at the time of his

arrest, and the personal property within the distillery building. Bearing in mind that it is the entrance to the building that is complained of, the court's attention is directed to the settled law to the effect that the legality of a search of a building may be raised only by the owner or one in lawful possession of the premises, and that such ownership or possession must be shown in the petition to suppress evidence.

> *Pong Ying v. U. S.*, (C. C. A. 3) 66 F. (2d) 67;
> *Mello v. U. S.*, (C. C. A. 3) 66 F. (2d) 135;
> *Bilodeau v. U. S.*, (C. C. A. 9) 14 F. (2d) 582;
> *Rouda v. U. S.*, (C. C. A. 2) 10 F. (2d) 916;
> *Brooks v. U. S.*, (C. C. A. 9) 8 F. (2d) 593;
> *Occinto v. U. S.*, (C. C. A. 8) 54 F. (2d) 351;
> *Remus v. U. S.*, (C. C. A. 6) 291 F. 501, 510;
> *Schwartz v. U. S.*, (C. C. A. 5) 294 F. 528.

In the *Mello case*, supra, the appellate court said:

> "It has been consistently held in the various circuits that the guaranty of the Fourth Amendment against unreasonable search and seizure is a personal right or privilege, available only to one who claims ownership or possession of the property which has been subjected to the alleged unreasonable search or seizure. This court so held in Chepo v. United States, 46 F. (2d) 70. The question was determined in the same way by the Second Circuit in Connolly v. Medalie, 58 F. (2d) 629; by the Fifth Circuit in Cantrell v. United States, 15 F. (2d) 953, certiorari denied 273 U. S. 768, 47 S. Ct. 572, 71 L. Ed. 882; by the Sixth

Circuit in Remus v. United States, 291 F. 501; by the Eighth Circuit in O'Fallon v. United States, 15 F. (2d) 740, certiorari denied 274 U. S. 743, 47 S. Ct. 587, 71 L. Ed. 1321; and by the Ninth Circuit in Bilodeau v. United States, 14 F. (2d) 582, certiorari denied 273 U. S. 737, 47 S. Ct. 245, 71 L. Ed. 866.

"Since no constitutional right of the defendants has been invaded, they are not in a position to attack the legality of the search and seizure. With this question disposed of adversely to the contention of the defendants, the record discloses that there was ample evidence to justify the jury in returning the verdicts of guilty."

Authorities cited by appellant in lower court in support of his alleged right to question right of officers to enter distillery building.

In the lower court appellant, in his Reply Brief, sought to bring himself within the rule that only an owner or one in lawful possession could object to the search of premises by claiming that the Fifth Amendment to the Constitution permitted the owner of personalty within a building to complain of the entrance to that building. However he was unable to cite any cases in support of his novel proposition. The cases that he did cite at that time are:

Lewis v. U. S., (C. C. A. 9) 6 F. (2d) 222;
Armstrong v. U. S., (C. C. A. 9) 16 F. (2d) 62.

The cases are not in point because the personal property that was seized in the *Lewis* case and referred to by the court consisted of a brief case and the evidence

obtained therefrom, and had no connection with the entrance and search of any house or building. Of course it was not the seizure of the brief case *per se* that was complained of in the *Lewis* case, but rather the evidence that was secured in the search thereof. The *Armstrong* case involves the entrance to a public garage and the seizure of an illicit distillery therein contained. The court in passing upon the legality of the search of the garage building uses language similar to that in the *Lewis* case, which it cites as authority for its ruling that no rights of Armstrong had been violated. In the *Lewis* case (p. 223) the court used broad language, as follows:

> "Plaintiffs in error, in their petition to suppress, made no claim either to the premises searched or to the property seized, and, in the absence of such a claim, they are in no position to raise the objection that the search was unreasonable or unauthorized or that their constitutional rights were invaded."

Appellant erroneously deduces therefrom that in the matter of entrance to a house or building for the purpose of searching; it is sufficient if he merely claimed in his motion to suppress an interest in the property within the building.

Appellee is satisfied that the order of the District Court denying the petition to suppress evidence was properly and correctly made on the basis of there being no proper party petitioner before it. For the convenience of this court, however, and, without in any degree minimizing the importance and conclusiveness

of that point, appellee presents, in the appendix to this brief, a discussion of the right of the officers to enter the premises under the circumstances here involved (See appendix).

II.

ADMISSION IN EVIDENCE OF CERTAIN DOCUMENTS TAKEN FROM PERSON OF APPELLANT AT TIME OF ARREST.

The second ground urged by appellant, in his Brief in support of his appeal, is that the court erred in admitting photostatic copies of documents taken from his person at the time of his arrest, and alleges that Assignment of Errors 11, 12, 14, 23, 27, 35 and 41 cover this field of his argument.

Generally speaking the Assignments mentioned, individually and collectively, embody the same general questions raised by the other Assignments, that is: the violation of the constitutional rights of appellant as guaranteed by the Fourth and Fifth Amendments; that original documents are the best evidence; and the dismissal of appellant by the United States Commissioner.

The matter of appellant's constitutional rights has heretofore been discussed. The authorities cited by the government amply support the ruling of the trial court, that no rights of appellant were violated by the entrance of the officers into the distillery building. As to the matter of dismissal by the United States Commissioner, it is sufficient to answer that a ruling of

a United States Commissioner, a subordinate of the District Court, is not binding, either upon the United States Attorney or the District Court (*U. S. v. Maresca,* 266 F. 713, 721). While appellant dwells at some length as to what took place before the Commissioner as testified in the trial court, such testimony is immaterial and of no effect in this or in the trial court, and is in the record simply because appellant insists that it be there.

The important point is, however, that the trial court heard the evidence, both on the hearing of appellant's Motion to Suppress, and at the trial itself, and in each instance found that no rights of appellant had been violated by any act of the government officers. See Order of his Honor Judge Louderback entered February 3, 1934 (Tr. 91-2).

As said by the appellate court in *Occinto v. U. S.,* supra:

> "The question of the legality of the search and seizure was a matter relating to the admission of evidence which is purely for the court and in this case was determined by the court before the trial. Steele v. U. S., 267 U. S. 505, 511."

Much importance is likewise attached by appellant to an Order, entered by his Honor the late Judge Kerrigan, and made long prior to the return of the indictment in this case, directing the return of documentary evidence taken from the person of the defendant. From this Order, which appears in toto at page 113 of the transcript, it is apparent that it was made by the trial

court only after the consent and approval of the then United States Attorney was endorsed upon the face of the proposed Order at the time of submission to the court. There is nothing in the record to show why the then Assistant United States Attorney approved the order, as represented by the initials S. A. A. appearing after I. M. Peckham, United States Attorney, under the designation "approved". No evidence was presented to explain this approval or to explain why the order recited that a motion to suppress evidence had been granted by the United States Commissioner. Apparently, however, the court can assume that as regards appellant the then Assistant United States Attorney believed that no sufficient case was presented to him. The Order of Judge Kerrigan, dated January 30, 1933, was entered exactly two days after Commissioner Williams, according to his testimony and records, had held defendant Ferrari and dismissed the other defendants, to-wit, Cappi and appellant, then known as John Caruso. The Commissioner, in his testimony (Tr. 153), said:

> "My records show that the disposition of the case was by me; on January 28, 1933 I held the defendant Ferrari and I dismissed the other defendants, to-wit, Cappi and Caruso. I have in my docket that Mr. Abrams, who represented the government at that time, consented to the dismissal of Caruso and Cappi. * * * I follow the policy of the United States Attorney, that is, if he suggests a dismissal I accept the suggestion. I would say there was no ruling by me on any Motion to Suppress so far as the defendant Caruso is concerned."

While appellant is the only defendant before the court at this time, the indictment in the case shows that those arrested at the distillery premises, that is Ferrari, Cappi and appellant, are named in the indictment returned by the Grand Jury. This indicates, of course, that the Grand Jury, when the case was presented to it, disagreed with the then United States Attorney that appellant and Cappi should be dismissed and Ferrari alone indicted. Instead, very properly, it indicted all defendants.

The case of *Silverthorne Lumber Co. v. U. S.,* 251 U. S. 385, is cited by appellant and quoted from, to some extent on pages 35, 36 and 37 of his Brief. He prefaces the quotation by the following unwarranted statement:

> "Where the search and seizure was held unreasonable and papers taken in connection with such search were ordered returned, it was error to use photostatic copies thereof in evidence upon the trial."

There is nothing in the facts of the *Silverthorne* case to warrant its citation by appellant in the case at bar. Likewise, there is nothing in this case to warrant the statement just quoted from the brief of appellant. The only Motion to Suppress heard on behalf of appellant in either the District Court or the Commissioner's Court was decided adversely to appellant and not in his favor, as the statement quoted above would seem to indicate.

Appellant then goes on to cite *Gouled v. U. S.*, 255 U. S. 298, as authority to the effect that to permit the use in evidence of documents taken from the person of appellant when the search and seizure is held unreasonable is equivalent to compelling the defendant to be a witness against himself. This case deserves but the same comment made by us in referring to the *Silverthorne* case, supra. Furthermore, it is difficult to understand appellant when he insists that the trial court held the search and seizure as to appellant to have been unlawful and unreasonable, when in fact the record is that the court's order is directly to the contrary.

Appellant, in his brief, then cites numerous cases to the effect that the order of Judge Kerrigan is binding on the trial court. It is not necessary to discuss any of those cases, because the most the order does is to direct the return of the documents. All of them apparently were returned and are presumably still in the possession of appellant. In any event no attempt has been made to have that order set aside. Consequently appellant's objection in this regard falls of its own weight and the trial court properly permitted the introduction of photographic copies of these documents in evidence.

III.

ADMISSION OF VON HUSEN MEMORANDUM.

The third ground of appeal, as made in the Brief of appellant (not covered by any Assignment of Error or objection made at the trial) is that it was error to

admit in evidence the Von Husen memorandum found on the person of appellant after his arrest (page 7 of Exhibit 8), for the reason that it was not shown that appellant had ever answered or acted upon the note, which read as follows:

> "I have shut off your water at valve in meter box. Meter running wide open. Pipe must be broken inside as water bill for month of Dec. will be over $75.00. Would advise getting plumber and calling at office, 425 Mason Street.
>
> Von Husen, Inspector
> S. F. Water Dept.
> 1/4/33 1:30 P. M."

Appellant cites *Poy Coon Tom v. U. S.*, 7 F. (2d) 109, as authority for his contention that this memorandum or note was inadmissible.

Of course the document in question was not a letter requiring an answer, and does not come within the rule laid down by this court in the *Poy Coon Tom* case.

In this connection, it should be borne in mind that appellant, at the time of his arrest, claimed to have been an innocent victim of circumstances:

> "He (appellant) stated that he did not know anything about the distillery; that he had been given the key by someone down there on Third Street who had told him that if he went to 60 Brady Street and entered this building he might find something in the way of work— * * * that he did not know the party who gave him the key." (Tr. 127-128; Witness De Kalb).

The witnesses Burt and Goggin testified to the same effect, Investigator Burt adds, however:

> "At that point he (appellant) refused to answer any further questions." (Tr. 146)

The document is admissible, therefore, if for no other reason, as bearing on the purpose of appellant's visit to the premises on the night in question and his connection therewith.

While appellee, for the convenience of the court, has discussed this phase of appellant's Brief on the merits, it nevertheless calls the court's attention to the fact that there is no Assignment of Error covering this particular point; furthermore no objection was made at the trial to the admission of this evidence other than the general objection, made to the introduction of all evidence, that it violated appellant's constitutional rights as alleged under the Fourth and Fifth Amendments, and that its admission was a violation of the best evidence rule. The only objection that might have had merit, if interposed on the trial, was the objection that the note was neither answered nor acted upon. This objection not having been made before the lower court, the right to predicate error on the admission of the evidence was waived, and appellant may not now, for the first time, urge error.

> *Phoenix Securities Co. v. Dittmar,* (C. C. A. 9) 224 F. 892, 895;
>
> *Wight v. Washoe County Bank,* (C. C. A. 9) 251 F. 819;
>
> *Louie Share Gan v. White,* (C. C. A. 9) 258 F. 798.

IV.

USE OF ROCCHIA FINGERPRINT CARD AS EXEMPLAR OF SIGNATURE OF APPELLANT.

Appellant, in his Brief under the heading "Fourth Ground for Reversal", claims error because the court permitted the introduction in evidence of a fingerprint card dated October 1, 1930, and bearing the signature of appellant (U. S. Exhibit 14).

Appellant at the time of his arrest gave his name as John Caruso and on the fingerprint card made at the time of his arrest, signed his name John Caruso (U. S. Exhibit 3).

It was incumbent upon the government to prove not only that appellant was arrested in the distillery on January 9, 1933, and that his statement then made that he entered the premises seeking work, was false and was made for the evident purpose of misleading the officers, but also that the very significant documents found in his possession (U. S. Exhibits 7 and 8) belonged to him and were in his handwriting. These documents included a driver's license, receipts for foreign money orders, automobile insurance identification card, certificates of bank deposits in the name of Antonio Rocchia, as well as memorandums showing purchases of sugar, cans, yeast and notations of cash receipts or payments including the sum of $300 to "Police". That some of these latter type documents were in the handwriting of appellant, is evidence not only that appellant lied to the officers when he was arrested, but also that he was vitally concerned with the operation of this distillery. It should also be borne

in mind in this connection that the Von Husen note which was found on the person of appellant and which stated that the water meter was running wide open and that the inspector for the water company had closed the water valve in order to prevent great loss of water and the incidental expense thereof, was left on the premises on January 4, 1933, five days previous to its being found on the person of appellant. This was proper evidence from which the jury could find that appellant had visited the premises in question on a previous occasion, or else that whoever did visit the premises had found the note and turned it over to appellant as the one who was most interested in it.

Professor Heinrich, an examiner of suspected and disputed writings, engaged in the practice of a consulting criminologist in the field of chemistry and physics, and admitted (Tr. 160) by appellant to be a qualified *expert* on handwriting and fingerprints, was called as a witness by appellee. He testified to having examined Exhibit 3, being the fingerprint card dated January 9, 1933, Exhibit 14, being the fingerprint card signed "Antonio Rocchia" and dated October 11, 1930; Exhibit 12, being the bail bond of appellant as given in the trial court; Exhibit 13, being the Thulin lease; and, portions of Exhibit 7; that he examined the handwriting on each of these cards and further testified that the signatures on the fingerprint cards, the lease and the bond were made by one and the same person. This witness likewise testified that the fingrprints on Exhibits 3 and 14 were the prints of the same man. In other words, he testified that

the card bearing the signature, Antonio Rocchia, contained the fingerprints of appellant and that they correspond with the admitted fingerprints of appellant on the card signed John Caruso. In this connection the witness testified under cross examination (Tr. 164-5-6-7):

> "The Court: As I understand it, you were not interested in alone in taking a signature that somebody told you was Rocchia's but you compared all these writings to establish in your mind that the same individual, whoever he might be, actually wrote these various writings?
>
> A. That is the way the problem was handled. That was the real problem so far as I was concerned. I don't know Mr. Rocchia. I never saw him write. Consequently it is by other testimony that someone must establish that some of those signatures are his signatures. The foundation of the examination was a signature. I did not have any other writings as the foundation or basis for my expert opinion. It was only told to me that that might be Rocchia's handwriting on Government's Exhibit 7 in evidence. When they submitted all these documents they were variously described. U. S. Exhibit No. 7 was described as an exemplar with a reservation that it had not been fully identified; that is the way it was presented to me. I included it in one of my exemplars with that reservation until after I had established my basis on the comparison of signatures, and thereafter I considered it with relation to the signature.

Q. In other words, you could take any one of those writings as an exemplar and by comparing it with the other writings you would be of the opinion that all the writings were by the same person; is not that correct, or have you a doubt as to any of those writings?

A. No, I have no doubt as to any of the writings but if the exemplars are withdrawn one by one until I am reduced to just the bond, which is Exhibit No. 12 (in evidence), and the lease, which is Exhibit No. 13 (in evidence), I would have to qualify my answer somewhat, but having before me Government's Exhibit 7 for identification (U. S. Exhibit No. 14 in evidence) bearing the signature Antonio Rocchia and the bond (U. S. Exhibit No. 12 in evidence) bearing the signature Antonio Rocchia, and Government's Exhibit No. 3 (in evidence) bearing the signature John Caruso, there is enough material in those four signatures to positively establish the identification, and from that to proceed to any other writing by the same person.

Mr. Perry. Q. Taking Government's Exhibit No. 13 in evidence, what are the dissimilar features to all the exemplars, taking each word?

A. When you include the exemplars as a group the dissimilarities are reduced practically to zero. If you select, for instance, that which seems to be farthest away, the bond, Government's Exhibit No. 13, and the signature Joseph Rossi on Government Exhibit 12, then we are comparing writing which differs in size and differs in the presence of certain letters. Joseph Rossi and Antonio Rocchia have in common only the letter

'o' and the letter 'i'. In the case of Government's Exhibit No. 12 the erroneous writing of 'c' following 'o' in the name Rossi—it is written 'R-o-c', and a correction appearing therein correcting it and concluding it as Rossi. The name as it was written was begun, 'R-o-c', exactly as it is in Rocchia. Those are the similar features. As to the dissimilar features the presence in the name Joseph Rossi, the 'J', the small letter 's' and the small letter 'e'. The small letter 'h' occurs in Joseph and in Rocchia as a common feature. I have enumerated them in so far as these letters occur which are common to the two names. They are not dissimilar in their construction or their formation, their slope or their style; they are dissimilar only in size. They retain, in spite of the difference in size, the same proportion and the same procedure in their production. The dissimilarities, if we may call them dissimilarities, are only those dissimilarities which involve the presence of other letters—letters which are not common to the two names."

Thus it can be readily seen that Exhibit 14 was valuable and necessary to the handwriting and finger-print expert in reaching his conclusion that the disputed documents found on the person of appellant and the lease for the distillery building itself were in the handwriting or contained the signature of appellant. Needless to say that was the only purpose for which the document was introduced in evidence. Moreover it was the only document signed by appellant prior to his arrest, which the government could

definitely prove was the signature of appellant, the other documents bearing different signatures, as for instance John Caruso, Joseph Rossi, etc.

Furthermore the expert witness on cross examination testified very definitely that he would have to qualify his answer if he were not permitted to use Exhibit 14:

> "In other words, you could take any one of those writings as an exemplar and by comparing it with the other writings you would be of the opinion that all the writings were by the same person; is not that correct, or have you a doubt as to any of those writings?
>
> A. No, I have no doubt as to any of the writings but if the exemplars are withdrawn one by one until I am reduced to just the bond, which is Exhibit No. 12, and the lease, which is Exhibit 13, I would have to qualify my answer somewhat, but having before me Government's Exhibit No. 14, bearing the signature Antonio Rocchia and the bond, Exhibit No. 12, bearing the signature Antonio Rocchia, and Government's Exhibit No. 3 bearing signature John Caruso, there is enough material in those four signatures to positively establish the identification, and from that to proceed to any other writing by the same person."

Authorities.

Certain cases have been cited by appellant to the effect that it is frequently prejudicial error to introduce in evidence proof of previous arrests or pre-

vious charges of a similar nature for the purpose of proving the guilt of defendant to the charge at issue. Of course the government has no quarrel with such cases or with the rule reiterated by them. However the case of *People v. Van Cleave*, 208 Cal. 295, cited by appellant as "a similar case to the case at bar" involves, as set forth in appellant's brief, the admission in evidence of a fingerprint card. The purpose of the admission of the fingerprint card in the *Van Cleave* case, however, contrary to the purpose in this case, was simply to prejudice the jury against accused. It is therefore obviously not in point. In the *Van Cleave* case no reason or purpose was advanced to support the introduction of the fingerprint card in evidence, and the court very properly found that its only purpose was to prejudice the jury. The court there said (Appellant's Brief p. 65):

> "The Exhibit was offered merely because it was inspected by the fingerprint expert during the investigation which preceded appellant's arrest."

The *Van Cleave* case is the only case cited by appellant in which the introduction into evidence of a fingerprint card showing a prior arrest is discussed. The case is not in point however for the reason just given, and although the California Supreme Court in that case did order a reversal of the judgment because of the admission of the fingerprint card, coupled with misconduct on the part of the trial judge, it is important to note that Chief Justice

Waste and Justice Richards of that court dissented from the majority opinion and said:

> "The majority opinion admits, without qualification, that 'there was sufficient evidence to support the verdict'. The further analysis of the evidence made 'in order to determine whether there has probably been a miscarriage of justice', does not, in my opinion, establish that the case was 'a close one'. The evidence in the case, aside from, and unaffected by, any errors of the trial court, being sufficient to support the conviction, no miscarriage of justice resulted."

The rule of the federal courts is to the same effect. Section 269 of the Judicial Code (28 U. S. C. 391), in part, reads:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the party."

The *Van Cleave* case, supra, as heretofore stated, is the only case cited by appellant in which the use of a fingerprint card at the trial is discussed. Being unlike the present case, in which the fingerprint card was used as an exemplar, it has no bearing, or relevancy on the instant case.

The other cases cited by appellant in support of his contention in this regard are not in point and need

not be here discussed. The quotations therefrom, appearing in appellant's brief, amply indicate appellee's contention that they do not apply.

Prejudicial evidence not necessarily inadmissible.

Moreover, as the Supreme Court of California once said:

> "It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the mind of the jurors is no ground for its exclusion."
>
> *People v. Walters,* 98 Cal. 138, 141.

The government, having established that Exhibit 14 was signed by appellant, it was entitled to the use of the document to prove that appellant was the lessor of the distillery building. Furthermore it was the only document in the possession of the government susceptible of proof of its having been signed by appellant prior to his arrest and at a time when he would have had no purpose in possibly disguising his handwriting. The fact that the exemplar, Exhibit 14, contained a record of a prior arrest of appellant does not deprive the government of the right to use

the document as an exemplar, *People v. Walters*, supra.

In his closing remarks in this regard appellant says (Br. p. 64):

> "In view of prior record on said fingerprint card the jury in arriving at its verdict must have been influenced thereby. It is apparent that the defendant was prejudiced by such evidence."

That such is not the case is apparent when we consider that the jury after very carefully weighing the evidence failed to convict appellant on the charge of conspiracy.

Moreover, if appellant had desired so to do he could have requested an instruction that the exhibit in question was only to be considered by the jury as an exemplar.

V.

ALLEGED MISCONDUCT OF COURT AND OF THE UNITED STATES ATTORNEY.

The fifth alleged ground for reversal, as contained in appellant's Brief, is misconduct on the part of his Honor, Judge Louderback, and on the part of the Assistant United States Attorney trying the case on behalf of the government. This contention is, perhaps, the best illustration of the extent to which appellant has gone in his attempt to defeat the ends of justice.

The court will readily see from the record (Tr. 115-122) that when the government sought to introduce secondary evidence, that is, photostatic copies of the documents taken from the person of appellant and returned pursuant to the order of January 30, 1933 (Tr. 113), appellant, through his counsel, made strenuous objection to the receipt thereof, in evidence, on various grounds, including violation of the constitutional rights of appellant; that the case as to appellant was dismissed before the United States Commissioner; and, that photostatic copies were not the best evidence. In connection with the latter ground counsel for appellant said:

> "Mr. Perry: I wish to make the further objection since your Honor has not ruled at this time, upon the ground that the documents, themselves, that they took from the defendant, Rocchia, are the best evidence."

Thereupon the following colloquy between court and counsel took place:

> "Mr. Goulden: There is no question about that, your Honor, if the defendant desires to produce them we will use them.
>
> Mr. Perry: I object to that as an improper remark by counsel.
>
> The Court: I think you are inviting trouble on yourself, Mr. Perry. He can demand any documents proper to be introduced by you. If he is demanding them, it is true that he has not gone through the formality of a notice to produce for instance. *Of course, if it is something that could*

> *not properly be before the court that is another situation.* So far as I know yet there is nothing to indicate that it was or it was not proper. The defendant was under arrest and a defendant under arrest can be searched if properly arrested." (Tr. 120).

Then followed testimony covering the results of the search of the person of appellant, after his arrest, and the introduction in evidence of photostatic copies thereof (Exhibits 7 and 8). After describing the documents, witness De Kalb, testified:

> "Investigator Burt had these papers in his possession. He retained them. I have seen an order in the files, an order of the court, ordering the return of certain papers, but I did not see them returned; they are not in the office at the present time. I found in the office duplicates or photographs—purporting to be photographs of the papers. I examined these photographs; they are true representations of the papers given to me by Mr. Burt and said to have been taken by him from the defendant Rocchia." (Tr. 124).

Thereupon appellant, through his counsel, made strenuous objection on the same grounds heretofore mentioned.

The court, in passing on the objection, said:

> "Any documents, if there were such documents, cannot be gotten at this time.
>
> Mr. Goulden: The government has made no demand, your Honor.

The Court: I think the only thing that can be done is to have the witness testify whether this appears to be a copy of the true document taken from the defendant at that time.

A. All with the exception of these three checks which do not represent anything that were on the person of the defendant, were shown to me by investigator Burt." (Tr. 126).

And, the court added:

> "Of course you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself. There is no doubt but that these photographs can be taken into consideration if they are true photographs of the documents that were upon the person of the defendant at the time which has been testified to." (Tr. 126-7).

It would seem therefore that the record itself as found in the transcript is the best answer to the contention of appellant in this regard. It there appears very definitely that defendant was not called upon to testify against himself or to produce evidence in his possession.

It is not necessary to review the decisions cited by appellant, holding that in a criminal case the defendant cannot be called upon to testify against himself.

Before the matter is passed, however, it may be proper for the government to suggest that appellant, in his brief, has shown an unfortunate tendency to unjustly criticize the trial court and to misquote the rec-

ord. For instance at page 77, and also at page 79 of his brief, the statement is made that the court refused to instruct the jury that the government could not make demand upon the defendant to produce evidence, yet the record shows that the court, in that regard and during the trial, said:

> "Of course you are right that we cannot get anything from the defendant. You are absolutely correct on that. It would be testifying against himself." (Tr. 126).

Furthermore in the court's instructions to the jury at the conclusion of the trial, the court said:

> "I might state that in the production of evidence here I think it is possible, although I have not reviewed the record, that the court indicated that it was incumbent upon the defendant to produce certain documents which had been returned to him, if application was made by the government for their production. That is the civil law but not the criminal law. If I did so state in the record I erred. I want you to understand that the defendant is not compelled to produce anything against himself, even if demand is made upon him in a criminal action. In your consideration bear that in mind, that the defendant is not required or expected, nor can you assume anything against him because he has not produced, if he has them —there is nothing to establish that he has them at the present time—any documents which might have been desired by the government to be produced, if they did so desire to have them produced." (Tr. pp. 180-181)

It is obvious, from the foregoing, that no reversible error was committed either by the trial court or by the United States Attorney. Further, that the court, during the trial and while instructing the jury, carefully advised the jury that appellant was under no obligation to produce any evidence against himself.

VI.

ALLEGED ERROR OF COURT IN ADMISSION IN EVIDENCE OF STATEMENTS MADE BY GOVERNMENT OFFICERS IN PRESENCE OF APPELLANT.

Appellant, in his brief, complains of the admission in evidence of oral conversations between the government witnesses in the presence of appellant on the evening of January 9, 1933, in the distillery building. He claims that such evidence violates the rules of evidence in regard to admissions. However, no assignment of error has been made in this regard nor was any such objection made at the trial to the introduction of this testimony by appellant. This being so, there is nothing before the court for review.

However, assuming that the question was properly raised, the court's attention is directed to the general rule, as stated by appellant on page 85 of his brief, quoting *Wharton's Criminal Evidence,* 10th Ed., Vol. II, Section 679, wherein such testimony is held to be admissible. Appellant then attempts to place the testimony complained of within an exception to the rule; that is within the rule holding that to be admissible

the statements must be of a character that would naturally call for action or reply on the part of appellant and relate to the offense charged. It will be remembered that the statements in question were made at the time of the arrest, and, as said by appellant, in his brief (p. 85), in front of appellant and while looking down at him, and not at some subsequent hearing as was the case in *McCarthy v. U. S.*, 25 F. (2d) 298, cited by appellant. However, in any event, the rule is that it is a matter within the discretion of the trial court. For authority for this statement we need only go to the case of *Di Carlo v. U. S.*, (C. C. A. 2) 6 F. (2d) 365, cited by appellant. There is no question here but that appellant heard and understood the statements complained of and, while it may be that he was under no duty to make answer thereto, his silence is a circumstance to be submitted to the jury. As was well stated by his Honor Judge Louderback at the trial:

> "It is a question whether a man has a question directed to him or when things are said that apply to him, it is of moment to know how a man acts or what he says in response thereto. In this case these statements were made in his presence and he did not elect to reply. I will allow it to remain in the record." (Tr. 133).

VII.

HARMLESS ERROR.

Assuming for the purpose of illustration only that error was committeed in the trial of this case, it is

such as would come within Section 269 of the Judicial Code heretofore cited, and did not affect the substantial right of appellant.

It will be recalled that appellee proved, at the trial, not only that appellant was arrested in the distillery building and that he owned the distillery, the 1000 gallons and more of whiskey and alcohol, the many thousands of gallons of mash, etc., but also that he was active in the management of the illicit enterprise; that he signed the lease for the distillery building under the assumed name of Joseph Rossi and that he also gave a false name at the time of arrest and attempted to bribe the government officer, by offering to pay some $1600 in his possession at the time of his arrest, and offering to make regular payments in the future. All of this evidence was competent and properly admitted and was sufficient upon which to base the judgment of conviction. Furthermore, appellant admits that the government amply proved that it was his hand that signed the Thulin lease, but contends that this proof is nullified because Exhibit 14 was used by the expert. And this in the face of the testimony of the expert that Exhibit 14 was a necessary exemplar to enable him to give an opinion in the matter of the handwriting of appellant.

Where evidence of guilt of a defendant is conclusive, error committed during trial is not reversible.

> *Taylor v. U. S.*, (C. C. A. 8) 19 F. (2d) 813;
> *Garcia v. U. S.*, (C. C. A. Porto Rico) 10 F. (2d) 355;

Smith v. U. S., (C. C. A. 8) 267 F. 665; rehearing denied 269 F. 365; certiorari denied 256 U. S. 690.

In the case of *Marron v. U. S.*, 18 F. (2d) 218, 219, affirmed 275 U. S. 192, this court had occasion to say:

> "Where there is ample evidence to establish the guilt of a defendant and sustain a verdict, courts are not ready to indulge in finely drawn speculations to sustain a claim of prejudice, made where rulings like the one here considered are called into question."

See also *Williams v. U. S.*, (C. C. A. 10) 265 F. 625.

In *Bain v. U. S.*, (C. C. A. 6) 262 F. 664, certiorari denied, 252 U. S. 586, involving a prosecution for defrauding a national bank, it was held that error in demanding that accused produce certain checks and drafts for use against him does not require reversal, where the court directed the jury to disregard the demand.

Likewise in *Thompson v. U. S.*, (C. C. A. 7) 10 F. (2d) 781, certiorari denied 270 U. S. 654, it was held that the trial court's suggestion that the defense be called upon to produce an original copy of a telegram was not ground for reversal where the court later stated that defendant did not have to produce anything.

Another interesting case in this connection is *Carpenter v. U. S.*, (C. C. A. 4) 280 F. 598, in which it was held that in a prosecution for possessing and con-

cealing liquor in violation of the National Prohibition Act, admission of evidence of other sales, prior to the taking effect of the Act, and not shown to have been connected with those charged, while error, was not ground for reversal in view of the evidence which clearly warranted conviction, and that such error was therefore without prejudice.

In conclusion, and in the language of this court in *Marron v. U. S.*, supra:

> " 'In reviewing a judgment in an appellate court, the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial', citing *Rich v. U. S.* (C. C. A. 8), 271 F. 566, *Trope v. U. S.* (C. C. A. 8), 276 F. 348, *Haywood v. U. S.* (C. C. A. 7), 268 F. 795."

Appellant it is respectfully submitted has not successfully sustained this burden.

SUMMARY AND CONCLUSION.

In conclusion, and summarizing the case as presented by this appeal, appellant has failed to establish any of his alleged grounds for reversal, i. e.:

> (1) Illegal search and seizure of his premises and violation of his constitutional rights under the Fourth and Fifth Amendments;
>
> (2) Error of court in admission of photostatic copies of papers taken from person of appellant;

(3) Error of court in admission of note of Von Husen, Inspector of San Francisco Water Company;

(4) Error of court in admission of fingerprint card bearing signature of Antonio Rocchia;

(5) Error of court in alleged refusal to instruct jury in the matter of alleged misconduct of United States Attorney; and

(6) Error of court in admission of oral statements made by government officers in presence of appellant at time and place of his arrest.

Answering the first ground, the government has pointed out that appellant having failed to allege in his Amended Motion to Suppress Evidence any right of possession or ownership to the premises at 60 Brady Street, the court had no alternative but to deny his Motion. Also that, in any event, assuming appellant to be a proper party to question the legality of the search, the search was in fact legal and for that reason also the Motion could properly have been denied by the trial court.

As to the second ground of error alleged by appellant, i. e., secondary evidence, suffice it to say that the record (Tr. 113) shows that the original documents taken from the person of appellant were ordered returned to him, and that therefore the government was entitled to introduce photostatic copies of said documents.

The third ground raised by appellant, in his brief, is the admission in evidence of the note made by Inspector Von Husen of the San Francisco Water Department on January 4, 1933, and found on the person of appellant five days later at the time of his arrest. It is not subject to review because it is not embodied in any assignment of error and no objection thereto was made at the trial. This evidence is clearly admissible, however, in the discretion of the trial court, if for no other reason than to show that appellant had not innocently and unintentionally entered the distillery building, and that he had either been there prior to the date of his arrest and personally found the note as placed by Inspector Von Husen, or that others turned it over to appellant as being the party to whom it should go.

The fourth ground complains of the admission of the fingerprint card signed Antonio Rocchia. This, as heretofore pointed out, was admissible, in the discretion of the court, for the purpose for which it was introduced, namely as an exemplar to prove the handwriting of appellant. And the fact that it may have contained data not to the best interest of appellant does not make it inadmissible, bearing in mind that appellant's objection to the document was not that it was not a proper document as an exemplar but rather that it was improper because it contained more than was necessary to be used as an exemplar. Nor does it become inadmissible because appellant's handwriting might have been, in appellant's opinion, proven by other evidence.

The fifth ground relates to alleged misconduct of the United States Attorney and alleged refusal of the court to instruct the jury. As heretofore pointed out, there was in fact no misconduct on the part of the United States Attorney, and no refusal or failure on the part of the court to properly instruct the jury. Defendant was not called upon by the government or the court to produce anything. The most that can be said is that the government fully admitted that the original documents were in possession of appellant, and, while there was nothing in this regard for the court to instruct the jury, the court nevertheless, and contrary to the misstatements appearing throughout appellant's brief, did instruct the jury not only at the time requested by appellant, but also in the instructions to the jury at the conclusion of the trial, to the effect that appellant as a defendant in a criminal case could not be called upon by the government to produce any document or testify in any manner against himself.

The sixth ground, set out in the brief of appellant, complains of the admission in evidence of the oral statements made by the government officers in the presence of appellant at the time and place of his arrest. That these statements were admissible in the court's discretion for whatever the jury determined to give them cannot be questioned. Suffice it to say, however, that no case has been cited by appellant in support of his objection, and furthermore that no objection was made to the introduction of the evidence save and except his stock objection that it violates the Fourth and

Fifth Amendments to the Constitution of the United States.

Furthermore the government has shown that appellant has utterly failed to show any abuse of discretion or error committed by the trial court in the conduct of the trial; and has failed to show, from the record as a whole, the denial of any substantial right of appellant.

Likewise, none of appellant's authorities go any further than to state general principles of law having no application to any of the assignments here raised, while appellee it is respectfully submitted has cited authorities sustaining its position that no reversible error appears in the record and that appellant was accorded a fair and impartial trial.

It is respectfully submitted, therefore, that the verdict of the jury and the judgment of the trial court are correct and proper, and that the judgment should be affirmed.

H. H. McPike,
United States Attorney,

Thos. G. Goulden,
Assistant United States Attorney,
Attorneys for Appellee.

(APPENDIX FOLLOWS.)

Appendix

LEGALITY OF OFFICERS' ENTRANCE TO PREMISES AT 60 BRADY STREET.

Briefly the facts are as follows: Three government officers testified in substance that on January 9, 1933, acting on reliable information that a distillery was being unlawfully operated in the premises at 60 Brady Street, San Francisco, they visited said premises a warehouse type building, and obtained a strong odor of fermenting mash, in the vicinity of the premises, which odor became stronger as the building was approached. That they also observed the odor of distillation and the sounds of a boiler, motor and burner within the building; that the odors of fermenting mash and distillation, and the sounds of the motor, burner and boiler, coupled with the prior experiences of the officers in investigating and seizing illicit distilleries while in operation, definitely indicated to them that a still was being operated on the premises; that they also observed that the building did not display the usual sign required of a lawful distillery (R. S. 3279; 26 U. S. C. 303); that from the sounds emanating from within the building and the odor of distillation, in the light of their experiences in this type of law violation, they knew that the distillery was in operation and being in operation was attended by one or more persons. Before entering the building for the purpose of arresting the operator or operators

and seizing the distillery, they made a careful observation of the building. They noted that it was approximately 50 feet wide and 100 feet deep and constructed of concrete; that it carried a sign indicating that a drayage business was conducted therefrom; that from the first street intersecting Brady Street the officers were in a way alongside of the building and to the rear of it; and that through the glass portion of the large door in the front of the building which was partially open, they observed that the interior of the building was divided by partitions.

> "We could see in about twenty or twenty-five feet back from the front what appeared to be a newly erected partition and through a small aperture at the top of that partition I saw a light coming through and I saw what appeared to be the top of a large door that had been cut in the partition but was concealed all but about 6 inches by a large pile of pasteboard cartons. There were truck tracks running back along that pile of cartons apparently through that doorway." (Tr. 81-2)

The officers further testified that the building presented, to one facing it on Brady Street, a small door on the extreme right and a large door in the center, that the large door was of the sliding type; that it was not locked and not fully closed; that the officers slid back this door, entered the premises, went through two partitions and discovered a large distillery in full operation and arrested the operator, Ferrari.

In this connection the government points out, in the matter of a search without a warrant, that

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."
>
> *Go-Bart Importing Co. v. U. S.*, 282 U. S. 344;
> *Garske v. U. S.*, 1 F. (2d) 620, 625;
> *Lambert v. U. S.*, 282 F. 413;

and again, that

> "To throw a shield of constitutional protection over a lawbreaker who has himself created the evidence on the outside of his premises that the law is being violated within such premises is to make the constitutional provision not a means of protecting against unwarranted entrance but a barrier to lawful entrance by a vigilant officer where evidence of law breaking comes from the premises thus sought to be shielded from all efforts to enforce the law."
>
> *Pong Ying v. U. S.*, (C. C. A. 3) supra.

> "A crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect, that such is the case. It is not necessary, therefore, that the officer should be an eye and ear witness to every fact and circumstance involved in the charge or necessary to the commission of the crime.

"The provision against unreasonable searches and seizures, being directed to prevent general exploratory writs and investigations of the homes of persons and the property of the citizen, has no application to and does not prevent the arrest in accordance with the course of common law, and of the statutes directing the same without a warrant, and wherever a felony has been committed, either in the presence of the officer or as to which the officer has a belief induced by reasonable grounds, or a misdemeanor has been committed in the presence of the officer, that is, of which the officer has evidence by his senses sufficient to induce a belief in him based upon reasonable grounds of belief, an arrest may be made without a warrant, and the instruments and evidence of crime seized."

U. S. v. Rembert, 284 F. 996.

"Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."

2 *R. C. L.,* 451.

In this connection the court said in *U. S. v. Rembert,* supra:

"Now it appears from these decisions that it is not essential, in making an arrest without warrant, the officer must absolutely know that an offense is being committed; he must believe that it is being committed, and must believe upon the evidence of his own senses in the case of a mis-

> demeanor, and in the case of a felony upon credible evidence of other persons."

A case very much in point is *McBride v. U. S.*, 284 F. 416. There federal officers went on the premises of the defendant without a search warrant, and without knowledge of the presence of any person, after having smelled fumes of whiskey then being made, and knew therefrom that a still was in actual operation. They saw no signs of any person and proceeded to the stable where the fumes led them, and entering saw a light in the cellar below and the steam of whiskey being manufactured, coming out. In the cellar a still was found in operation and the operators were taken into custody. A petition to suppress was made and denied. On appeal the appellate court, in its opinion, said:

> "The entry on these premises and into the stable was not to search for evidence but upon ascertaining that whiskey was in process of manufacture thereon, to arrest those in the commission of an offense then in progress. If an entry can be made without warrant in cases where the officers acquired information evidencing the present commission of a crime, then the use of knowledge acquired by lawful entry is not the use of knowledge illegally acquired.
>
> "Where an officer is apprised by way of his senses that a crime is being committed, it is being committed in his presence so as to justify an arrest without warrant."

And in the very recent case of *Mello v. U. S.*, supra, wherein the facts, if not identical, closely parallel the facts in the instant case, the court said:

> "The prosecution was based upon testimony of prohibition agents and investigators that they detected the odor of fermenting mash emanating from the premises in which the defendants were later arrested, and that they heard the sound of machinery and the hiss of steam. They thereupon entered the premises without a search warrant and found a still in operation, 2000 gallons of alcohol, and 45,000 gallons of mash in the process of fermentation."

The officer there testified:

> "I did not hear anybody, but I heard the machinery running and the hissing of steam, and I took it for granted someone was there attending to the machinery."

The controlling authority in this circuit is *Donahue v. U. S.,* 56 F. (2d) 94. The instant case differs therefrom in that a dwelling is not involved. Our appellate court there said:

> "The illegal manufacture of liquor is a felony. * * * If the information which had reached the officers prior to the arrest and search, that is, prior to the opening of the door of the dwelling house, and the knowledge they had gained through their senses of smell and hearing, was sufficient to give them probable cause to believe that a felony was being committed in their presence, they were entitled to enter the dwelling and make the arrest. (Citing cases).
>
> * * * * * * *
>
> "It is familiar law that it is presumed that one intends to do that which he in fact does do.

> Therefore it is clear that the officers intended to make an arrest, and it is difficult to escape the conclusion that, before they entered the premises, they had formed the intent to arrest the individuals found operating the still."

No contention is made that the sense of sight is better than the combined senses of smell and hearing, as a basis for probable cause to believe a violation of the law is taking place.

> "Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight."
>
> *U. S. v. Borkowski,* 268 U. S. 408, 412.

Under all the circumstances of this case there existed ample probable cause for the officers to conclude not only that contraband property was unlawfully in the building, but also that a crime was in the actual commission therein, giving the officers the right of immediate entry for arrest and seizure. This is true in the case of illicit stills irrespective of whether or not any one is found in actual operation of the still or not.

As to whether the officers had knowledge that a still was unlawfully in operation on the premises, it is sufficient to point out that Revised Statute 3279 (26 U. S. C. 303) provides:

> "That every person engaged in distilling or rectifying spirits * * * shall place and keep conspicuously on the outside of the place of such

> business a sign exhibiting in plain and legible letters not less than three inches in length * * * the name or firm of the distiller, * * * with the words 'registered distillery' * * *."

Furthermore, Revised Statute, Section 3282 (26 U. S. C. 307) prohibits the making or fermenting, in any building or on any premises other than a distillery duly authorized according to law, of mash, wort or wash fit for distillation or for the production of spirits or alcohol.

Searches and seizures of contraband articles are to be liberally construed. In *U. S. v. Lefkowitz,* 285 U. S. 452, 465, the Supreme Court said:

> "The decisions of this court distinguish searches of one's house, office, papers, or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia, and illicit liquor, in order to prevent the commission of crime."

It is obvious therefore that the prohibition officers in the instant case were definitely apprised of violations of the two statutes mentioned on the premises prior to their entrance, i. e., that a still was unlawfully in operation on said premises, and that mash was unlawfully being fermented on said premises,

and that either violation entitled the government officers to enter and seize the contraband property irrespective of whether or not the seizure followed an arrest.

There can be no doubt from the testimony that the officers had ample probable cause to believe and did believe that a violation of the laws was taking place in their presence, and that they were not only entitled to enter and arrest such violators, but were duty bound to do so.

The situation is well stated in the concurring opinion in *Mello v. U. S.*, supra, where the court said (p. 137):

> "The prohibition officer summed the whole thing up in his answer to the question, 'Why didn't you go get a search warrant if you knew so surely? A. I didn't figure I needed a search warrant. If I had the evidence to get a search warrant, I had the evidence to seize it without.' It seems to me this sums up the situation."

In passing it should be pointed out that in the *Mello* case, the court denied the petition to suppress on ground of lack of proper party petitioner (and for the same reasons here urged), and the concurring opinion merely adds that the search was justified in any event.

It is obvious from the foregoing, when read in the light of the facts in the present case that, even if appellant was a proper party to question the officers' entry into the 60 Brady Street premises, the entrance

was lawful and violated no constitutional rights of the owner therof.

STATUTES, AND CONSTITUTIONAL AMENDMENTS DISCUSSED IN BRIEF.

AMENDMENT IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. C., Constitution, Part 2, p. 459.

AMENDMENT V.

"No person shall * * * be compelled in any criminal case to be a witness against himself." U. S. C., Constitution, Part 2, p. 504.

SIGNS PUT UP BY DISTILLERS.

"Every person engaged in distilling or rectifying spirits * * * shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than 3 inches in length, painted in oil colors and in a proper and proportionate width, the name or firm of the distiller * * * with the words 'Registered distillery' * * *." R. S. 3279 (26 U. S. C. 303).

MASH, WORT AND VINEGAR.

"No mash, wort or wash, fit for distillation or for the production of spirits or alcohol shall be

made or fermented in any building or on any premises other than a distillery duly authorized according to law * * * and no person other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort or wash * * *." R. S. 3282 (26 U. S. C. 307).

NEW TRIAL: HARMLESS ERROR.

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the party." Sec. 269 Jud. Code (28 U. S. C. 391).

No. 7841

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

GLENN PERKINS

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

FILED

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

GLENN PERKINS

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 851

COMPLAINT

Filed April 5, 1932

Comes now the plaintiff in the above entitled action and complaining of the defendant alleges as follows, to-wit:

I.

The plaintiff herein is now a resident and citizen of Dayton, County of Franklin, State of Idaho, which is within the Eastern Division of the United States District Court of Idaho.

II.

That on the 9th day of August, 1917, said plaintiff enlisted for military service in the United States Marine Corps and served as a member of said United States

Marine Corps continuously thereafter until he was honorably discharged from said United States Marine Corps on the 17th day of June, 1919.

III.

That while in the United States Marine Corps and during the period between his said enlistment and his said honorable discharge as mentioned in the preceding paragraph of this complaint, desiring to be insured against the risks of war hazard, he applied for a policy of War Risk Insurance in the sum of Ten Thousand and no/100 ($10,000.00) Dollars, and at the time of said application authorized the deduction from his service pay for all premiums that might become due for the said insurance, and said premiums were thereafter deducted from his said monthly service pay.

IV.

That a certificate of War Risk Insurance was duly issued by the defendant to this plaintiff and by the terms thereof this defendant agreed to pay to this plaintiff Fifty-seven and 50/100 ($57.50) Dollars per month in the event of this plaintiff's suffering total and permanent disability, and that premiums were paid on said contract in accordance with the authority given as set forth in Paragraph III hereof, until the 30th day of June, 1919. And that said contract of War Risk Insurance was duly issued and premiums were paid thereon and said contract was in full force and effect at the time of this plaintiff's discharge from the military service as aforesaid.

V.

That while this plaintiff was in the military service of the United States as aforesaid, and while said contract of insurance was in full force and effect, this plaintiff did contract

Neurasthenia
Gunshot wound left hand, foot, and leg
Arthritis
Pyelitis with cystitis
Heart trouble
Gas infection of lungs
Nephritis
Enteroptosis
Hyperopia
Pharyngitis, chronic

and that this plaintiff has continuously from the time said insurance was in full force and effect to the present date, suffered as a result of said

Neurasthenia
Gunshot wound left hand, foot, and leg
Arthritis
Pyelitis with cystitis
Heart trouble
Gas infection of lungs
Nephritis
Enteroptosis
Hyperopia
Pharyngitis, chronic

and that this plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that as a result thereof the said plaintiff was at the time of his said discharge from said military service which was at a time that the said contract of insurance was in full force and effect, totally and permanently disabled, and has been so totally and permanently disabled from that time to the present date and that he will never be able to follow continuously a substantially gainful occupation; that by reason thereof he became entitled to receive from the defendant, the said sum of Fifty-seven and 50/100 ($57.50) Dollars per month from the date of his discharge from the United States Marine Corps, to wit: the 17th day of June, 1919.

VI.

That the plaintiff has made application in writing to the defendant through its Veterans Administration, its Veterans Bureau, and the Director thereof, for the payment of said insurance benefits making his claim therefor on or about the 26th day of June, 1931. That the said defendant through said Veterans Administration and the Director of said Veterans Bureau has failed, neglected, and refused to pay to this plaintiff, said insurance or any part thereof, but claims and contends that the plaintiff has no right to the said payments or the payment thereof, and that on or about the 1st of April, 1932, this plaintiff received from the Veterans Administration

and the Director of said Veterans Bureau, notice that there exists a disagreement as contemplated within the provisions of Section 19 of the World War Veterans Act as amended July 3, 1930. And that there is now such a disagreement as required by Section 445 Title 38, U. S. C. A. and such a disagreement does now exist between this plaintiff and this defendant.

VII.

That this action is filed after July 3, 1931, but within the period of time thereafter less than the period elapsing between the filing in the said Bureau of the claim here sued upon and the denial of said claim by the aforementioned Director and within the time as required by said World War Veterans Act.

WHEREFORE, Plaintiff demands judgment against this defendant in the sum of Fifty-seven and 50/100 ($57.50) Dollars per month from the 17th day of June, 1919, together with interest thereon and his costs and disbursements herein incurred, and attorneys fees as provided by law and as in the judgment of this court may de deemed just and reasonable, and that the Court determine what is a reasonable fee to be allowed to plaintiff's attorneys and direct the payment of said fees to plaintiff's attorneys.

B. W. OPPENHEIM,
J. M. LAMPERT
J. B. MUSSER,
Attorneys for plaintiff.
Residence: Boise, Idaho.

(Duly verified)

(Title of Court and Cause.)

ANSWER

Filed January 11, 1933

Comes now the defendant in the above entitled action, and answering plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

Answering Paragraph I. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

II.

Answering Paragraph II. of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that the plaintiff entered the military service of the United States on August 9, 1917, and was honorably discharged therefrom on June 20, 1919.

III.

Answering Paragraph III. of plaintiff's Complaint, this defendant admits the allegations contained therein.

IV.

Answering Paragraph IV. of plaintiff's Complaint this defendant denies each and every allegation contain-

ed therein; in this connection, however, it is admitted that a certificate of war risk term insurance was duly issued by the defendant to the plaintiff by the terms whereof the defendant agreed to pay the plaintiff $57.50 per month in the event that he suffered total and permanent disability while said contract of insurance was in full force and effect; it is further admitted that premiums were paid on plaintiff's policy to include the month of December, 1919.

V.

Answering Paragraph V. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

VI.

Answering Paragraph VI. of plaintiff's Complaint, this defendant denies each and every allegation contained therein, except insofar as said paragraph alleges that a disagreement exists between the plaintiff and the defendant; and in this connection it is admitted that a disagreement exists between the plaintiff and the defendant.

VII.

Answering Paragraph VII. of plaintiff's Complaint, this defendant admits the allegations contained therein.

WHEREFORE, having fully answered plaintiff's

Complaint, defendant prays that said Complaint be dismissed, and that plaintiff take nothing thereby, and that defendant have judgment for its costs.

H. E. RAY,
United States Attorney
for the District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney
for the District of Idaho.

Attorneys for the Defendant.

(Duly verified)

(Title of Court and Cause)

AMENDMENT TO ANSWER

Filed February 1, 1933

Comes now the defendant in the above entitled cause, leave of Court being first had and obtained, and amends Paragraph VI. of defendant's Answer to read as follows, to wit:

VI.

Answering Paragraph VI. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

H. E. RAY,
United States Attorney
for the District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney
for the District of Idaho.

Attorneys for the Defendant.

Leave of Court to file the foregoing Amendment granted.

CHARLES C. CAVANAH.
District Judge.

(Title of Court and Cause.)

COURT MINUTES

October 18, 1934

This cause came on for trial before the Court and a jury, Messrs. J. M. Lampert and J. B. Musser, appearing for the plaintiff, and Frank Griffin, Assistant District Attorney, and A. L. Freehafer, Attorney for the Department of Justice, appearing for the United States.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. I. T. Reese, whose name was so drawn, was excused for cause; and Theodore Dance, Parley Lloyd, and Arthur Winters, whose names were also drawn, were excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause, and a true verdict render, to-wit:

Arley Dewey, Merrill D. Skinner, J. E. Fox, Max Chambers, Luke Dayton, J. L. Seedal, W. W. Tingey, K. M. Parkin, A. W. Jensen, C. F. Potter, A. T. Matthews and E. J. Kidd.

A stipulation of certain facts was presented and filed, after which, a statement of the plaintiff's case was made by his counsel to the jury. It was ordered that both sides have exceptions to all adverse rulings of the Court. The deposition of Dr. Curtis Bland was read in evidence on the part of the plaintiff.

After admonishing the jury, the Court excused them to nine-thirty o'clock A. M. on Friday, October 19, 1934, and continued the Trial to that time.

(Title of Court and Cause.)

COURT MINUTES

October 19, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

The reading of the deposition of Dr. Curtis Bland was resumed and concluded and Bernard C. Perkins, Loren Mendenhall, Mary Perkins, M. L. Jensen, Willis Mendenhall, Mrs. Glenn Perkins and Glenn Perkins were sworn and examined as witnesses and other evidence was introduced on the part of the plaintiff.

After admonishing the jury, the Court excused them to nine-thirty o'clock A. M. on Saturday, October 20, 1934, and continued the trial to that time.

(Title of Court and Cause.)

COURT MINUTES

October 20, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Glenn Perkins was recalled and further examined. Dr. Ellis M. Kackley and Dr. A. R. Cutler were sworn and examined as witnesses on the part of the plaintiff and here the plaintiff rests.

The deposition of Dr. G. E. Riggs, Dr. L. R. Quilliam and Dr. C. H. Sprague were read in evidence and Dr. P. J. Germon and Dr. H. E. Traubau were sworn and examined as witnesses on the part of the United States

and other evidence was introduced on the part of the defendant and here the defendant rests and both sides close.

The Government's counsel moved the Court to direct the jury to return a verdict in favor of the defendant. After hearing counsel on the motion the Court denied the same. The defendant was granted exceptions to the order.

After admonishing the jury the Court excused them to nine-thirty o'clock A. M. on Monday, October 22, 1934, and continued the trial to that time.

(Title of Court and Cause.)

COURT MINUTES

October 22, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Counsel for the Government moved the Court for a dismissal of the action which motion was denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict.

While the jury was still out, the Marshal was directed to provide them with lunch and dinner at the expense of the United States.

The jury was instructed in case of their agreement to seal the verdict and to return the same into court at nine-thirty o'clock A. M. on Tuesday, October 23, 1934, and the bailiff was directed to permit the jurors to disband upon their arrival at a verdict.

(Title of Court and Cause)

COURT MINUTES

October 23, 1934

Counsel for the respective parties being present, the Jury returned in court, it being agreed that the members thereof were all present whereupon, the jury, through their foreman presented their written and sealed verdict, which was in the words following, to-wit:

(Title of Court and Cause.)

VERDICT

"We, the Jury in the above-entitled case, find for the plaintiff and fix the date of the beginning of his permanent and total disability from June 17th, 1919.

A. W. JENSEN, Foreman."

The verdict was recorded in the presence of the jury, read to them and they each confirmed the same.

It is ordered that the defendant have sixty days from this date in which to prepare, serve and lodge proposed bill of exceptions in the above-entitled case.

It is further ordered that the October Term, 1934, of this Court be, and the same hereby is extended for the period of ninety days for all purposes in respect to the preparing, submitting, lodging and settlement of bill of exceptions.

(Title of Court and Cause.)

VERDICT

Filed October 23, 1934

We, the Jury in the above-entitled case, find for the plaintiff and fix the date of the beginning of his permanent and total disability from June 17th, 1919.

A. W. JENSEN. Foreman.

(Title of Court and Cause.)

JUDGMENT ON VERDICT

Filed October 24, 1934

This cause having come on regularly for hearing before the above entitled court in the court room thereof

at Pocatello, Idaho, upon the 18th day of October, 1934, J. M. Lampert, Esq., of the firm of Oppenheim and Lampert and J. B. Musser, Esq., appearing for and representing the plaintiff throughout said hearing, and Frank Griffin, Assistant United States Attorney for the District of Idaho, and A. L. Freehafer, Esq., Attorney, United States Department of Justice, appearing for and representing the defendant throughout said hearing, a jury was duly impanelled and sworn, and evidence both oral and documentary introduced, and arguments made by respective counsel, and the jury duly instructed by the Court, and the cause submitted to the jury.

Whereupon, upon the 23rd day of October, 1934, the said jury returned into open court with its verdict wherein it found:

> "We, the Jury in the above-entitled case, find for the plaintiff and fix the date of the beginning of his permanent and total disability from June 17th, 1919.
>
> A. W. JENSEN, Foreman."

Wherefore, by reason of said verdict and the law applicable thereto, the court thereby finds that the plaintiff herein became totally and permanently disabled on the 17th day of June, 1919, and has been since said date and now is totally and permanently disabled, and that the said war risk insurance described in the complaint is in full force and effect.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant herein 184 monthly installments of $57.50 each, or the total sum of $10,580.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ten per cent of all sums to be paid pursuant to this judgment is hereby fixed as a reasonable attorney's fee to be allowed to J. M. Lampert and J. B. Musser, as attorneys for the said plaintiff, the same to be paid to said J. M. Lampert and J. B. Musser by the Veterans Administration of the United States, or the Agency having charge of the payment of the same, out of any and all payments to be made to the said Glenn Perkins, or to his estate, or to the beneficiary or beneficiaries under said insurance policy, the same to be apportioned to them as follows:

Five per cent to J. M. Lampert at Boise, Idaho,

Five per cent to J. B. Musser at Boise, Idaho.

Dated at Pocatello, Idaho, this 24th day of October, 1934.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

Lodged March 28, 1935

Filed April 2, 1935

BE IT REMEMBERED, that the above entitled case came on for hearing before the Honorable Charles C. Cavanah, District Judge for said district, with a jury, at Pocatello, Idaho, on the 18th day of October, 1934, at the hour of eleven o'clock A. M., on the issues joined by plaintiff's complaint and the answer and amendment to answer of the defendant, J. M. Lampert, of Oppenheim & Lampert, and J. B. Musser, both of Boise, Idaho, appearing for plaintiff, and Frank Griffin, Assistant United States Attorney for the District of Idaho, and A. L. Freehafer, Attorney, Department of Justice, both of Boise, Idaho, appearing on behalf of defendant, at which time and thereafter up to and including the 23rd day of October, 1934, when the verdict of the jury was returned, filed and entered, and to October 24, 1934, when the judgment on verdict was rendered, entered and filed herein, and after the empaneling of the jury and the opening statement of counsel for the plaintiff, the following proceedings were had: in respect of the assignment of error herein,—

MR. LAMPERT: I will ask you, Doctor Cutler, to step forward, as I am about to present the hypothetical

question. I would like to have you be seated inside the railing there where you can hear this question. It is the Court's desire, and it is the practice, that we propound the hypothetical question to the witness and to the other physicians at the same time to avoid repetition.

Q. Doctor, in addition to your findings and diagnosis, and the definition for total and permanent disability which I have given you, I will ask you to assume these facts, and wipe out from your mind any other facts than those I am now presenting to you in this assumed question,—I mean by that, other than your own findings and diagnosis: That this plaintiff had an education of two years in the high school,—was in his second year when stopping his education; that he was a farmer through training and occupation throughout life, had no other avocation or training other than that after the war, and that from about January 15th, 1921, to September, 1923, he was under instructions from the University of Idaho at Moscow for the period from January 15th, 1921 to about March 1st, 1921 in the forestry work, and from that period on to about September 1923 under training for agricultural pursuits on placement training, placed upon a ranch where he worked under supervision from about March 1st, 1922 to September 30th, 1923,—that he entered the military service on the ninth of August, 1917 entered the Marine Corps, and served there in that service until he was honorably discharged on the 20th day of June, 1919, save and except that on Novem-

ber 1st, 1918, he received wounds while engaged in battle in the Argonne, as a result of which he was taken first to the field hospital, then the Red Cross Hospital, and then the Base Hospital, finally on to Brest, and transferred to the United States as a casual in March to Quantico, Virginia, and continuing as a casual he was finally sent back home on a furlough, arriving at his home near Pocatello, Idaho, on or about May 1st, 1919, remaining there until the formal discharge was issued to him at Salt Lake City on June 20th, 1919; that during this period of his military service he arrived in France on or about March 5th, 1918, and within three weeks began engagements in active warfare, continuing for about a week, and then was in training, finally landing in the permanent active front line warfare on or about June 1st, 1918, being at the Chateau-Thierry, Soissons, Toul, Champagne, and Argonne sectors; that during that time he inhaled gas, one time to the extent that he was caused to vomit, and vomited in the gas mask; that he received burns, gas burning in several of these engagements, and that these body burns continued with him to the present time, and have throughout the years; that the inhaling of the gas caused burning sensations in his throat; that he was forty-six days under what he termed constant battle line work on one occasion, although he would have hours of rest at times, digging into holes in the trenches, that he had during that period of time gone as long as,—well, he only had one change of clothes during that period of

time, his clothes being wet much of the time, he being in water, standing in water much of the time; that during that period from about the first of June to the first of November, 1918, he was under much heavy shell fire, and a major portion of the time he was irregular with his meals, many days only receiving one meal; that on occasions he was without water for a considerable period of time, so that he became thirsty enough to on one occasion, at least,—yes, on two occasions to drink warm water from the cooling system of the German machine guns as they marched on into the German territory; that during the Chateau-Thierry engagement he was struck on the head with a flying object and became unconscious; that the injury I referred to as occuring on November 1st, 1918, was a shrapnel wound in the left foot, also in the left hand and left leg. He was not treated at the time for the left leg wound other than his own attention; the left hand wound was treated by a German prisoner on the way back to the hospital, and later treated in the hospital; the left foot was not given treatment at the time although it was sore and swollen from the injury, and its first treatment was by a Doctor Sprague in Pocatello on or about January, 1920, who then operated upon it; that the gas burns or sores are the most noticeable on the chest, legs, face and neck; that while at the San Mihiel front, which was in September in 1918 he first had a lame, sore back, which has continued from that time until the present; that again in October at the Cham-

pagne front while urinating he experienced a hurting and burning sensation; that he found his urine was bloody, of a bloody color, and that hurting and burning sensation and the bloody color continued for a couple of days; that again in the base hospital,—after November 1st, 1918 when he was taken back to the base hospital he was bothered in the same way, and had the same pains and suffering and the lame back and hips, and the smarting and burning while urinating, and that these pains and this suffering has continued to date, not to the same degree of severity each and every day, but constantly with him in some degree; that the urine was some times thick, not always bloody; that during the period of that warfare while wet and cold he had dull pains and aches and his arms became stiff, and that he still has dull pains and aches in his arms and shoulders, and that after he came to his home, within two or three days after his arrival, his mother's attention being attracted by his complaint of pains in the back, she applied mustard plasters; that from that time to the present he has had frequent applications of mustard plasters, rubbing with turpentine, and massaging on his back by his mother, brother, or wife; that that has not been daily, but very frequently throughout the period of time, and that he also in 1919 upon the recommendation of a doctor at Preston he had and made use of what he termed a Johnson & Johnson kidney plaster, and they have been applied constantly from that time to this; that after he arrived home he had a yellow

complexion, was thin, sunken cheeks, moved slowly, was nervous, would lie down and get up and move around in conversation; that in the month of June, 1919, he had what he termed a bad spell lasting for a couple of hours, having severe pains in the back, and in connection with the passage of urine; that during this period it was observed that he was bothered at night with getting up frequently and urinating, and that his urine was bloody and was stringy and pus-like, and this condition continued frequently from that time to the present; that the first week of July, 1919, he was given treatment for pyelitis, cystitis and neurasthenia by a medical official of this state who at that time found him under-weight, anaemic, tired, and exhausted, that he would get up in the morning still tired, suffered from a kidney difficulty and pain in the back and tenderness and pain extending into the groin, an irritability of the bladder and frequent urination, and more or less discomfort at the time of urinating that this pain, appearance, condition, pains and suffering that I have related as occuring on those occasions have continued throughout to the present time; that he has been treated, examined and given treatment by Doctor Bland, Doctor Cutler, Doctor States, Doctor Kackley, Doctor Sprague, Doctor Milford of his own choosing, and in addition thereto has made trips to the Veterans Hospital at Boise, where he has been under examination in 1923, 1924, 1926, in 1929, 1930 and 1932; that in addition to that while at the University he re-

ceived treatment by a Government doctor and for the same ailments, pain and suffering; that while there he was also sent for examination to a representative of the Government, a physician for the Veterans Bureau, or Public Health Service, in Spokane, that being in 1921, both of those instances; that on his arrival home he did no work during the months of May, June and July, remaining at his father's and mother's home near Pocatello; that following that he had approximately two months employment with the Forestry Department, receiving for his services there four dollars per day, that working consisting first of two weeks waiting orders at Hailey, Idaho, and then the balance of the time as an assistant on a truck in connection with fire-fighting service up in the Salmon River country; that he came back from that service about October 1st, 1919, and then again remained around his home without any work, other than occasionally going over to the dairy herd,—dairy farm his father was operating, and at times aiding in the milking and the chores, that continuing until about January 15th, 1921; that thereafter he attended the University under the training I have heretofore referred to for forestry work, and later in placement training from February, 1921,—February, 1922 until about September, 1923, during which time he, in addition to the studies at the University which consisted of going to the University at about nine o'clock in the morning, remaining some days until twelve, other days maybe one hour or

two hours in the afternoon, never more than three hours in the afternoon, and that he missed a few days in addition to those afternoons that I have referred to, otherwise taking quite regularly that course; that after he came back to the placement training,—that was upon the farm adjacent to the town of Dayton, where he had in connection with his operations two farms, one consisting of approximately eighty-four acres, which was in his name and owned by him, subject to a mortgage, which he had acquired before the war, and which he lost by reason of the mortgage foreclosure on or about 1925 in the month of June, and in addition to that he had there two hundred and sixty acres, approximately, consisting of about fifteen acres of irrigated land, the balance dry farm, mostly in wheat, some in pasture; that during the time that he was there upon that farm between the months of November, 1922, and September, 1923, he made reports as to his activities there, which include among other things the following: That he reported as to a total of 1158 hours up to March 24th, 1923, that being the winter season covering the first winter of 1922-1923, out of which time 570½ hours were devoted to doing chores, the chores consisting of milking from three to five cows daily, taking care of the stables, one team of horses, five young pigs, and nine chickens; that in addition to that he occasionally fed some other stock which was running out on the range, but to which he would occasionally throw hay. In addition to that he

spent ninety-eight hours during that period of time in connection with repairs on a barn; forty-four hours repairing fences; fourteen hours plowing potatoes; six hours at lunch; "ten hours off today because of wife's health;" eighteen hours threshing; five hours hunting cattle; 89½ hours consulting with his counsellor, or supervisor on the ranch, the Government representative; 79½ hours studying, or reading and studying literature in connection with farm operations, bulletins from the University, etc.; 59½ hours hauling hay; 76½ hours hauling manure; 84½ hours miscellaneous activities; three hours in connection with building or repairing a poultry house; that in the second period of time, that is, from the latter part of March, 1923 to September 29th, 1923, a period where he reported a total of 1775 hours of activity, 475 hours of the time being devoted to the doing of chores; five hours to hauling hay; 64 hours to hauling manure; 66 hours studying and reading papers and bulletins; 14 hours repairing buildings; 90 hours miscellaneous activities; sixteen hours calling on doctors, medical attention; fifty hours visiting and consulting with the agent or counsellor; 93 hours building and repairing chicken coops; 101 hours plowing and harrowing; 52 hours working on, or taking care of baby chicks; 77 hours repairing fences; fourteen hours drilling beets; 91 hours irrigating; 145 hours in field with beet thinners, and in that connection his labors there were supervisory, he doing none of the thinning; mowing and hauling hay

100 hours during the haying season; 162 hours hoeing beets; 100 hours cutting grain; 44 hours drilling grain; and sixteen hours cleaning weeds from the summer-fallowed land; that during that period of time and in the months of February and March, 1923, he was in the hospital at Boise for approximately two weeks, and that no reports as to activities were made from August 18th to September 22nd.

Doctor, I was referring at the time of the recess to the record of activities during his vocational training, closing with the placement period on the farm, ending on or about September 30th, 1923 and in connection with that, in addition to the reports as to the hours of activity and the nature of that activity, I will add this additional information from the reports: This question is asked and answered by the plaintiff on the report as rendered: "Does your physical condition permit of satisfactory progress in this employment objective?" To twenty-four times that question is asked he answered "Yes," sixteen times,—correct that, twenty-two times, and he makes no answer on the other two reports. The next question, "Are you satisfied with your progress and confident of becoming employable?" His answer to that, out of twenty-four times that the question is asked is affirmatively, yes, sixteen times, twice he fails to answer, and six times he makes approximately this answer, "Not satisfied. Insufficient instruction," and approximately that same language is to all six of these reports. I would also

ask you to assume that beginning with a period at Chateau-Thierry, in addition to the pains in the shoulder, and from that time to the present he has had frequent swelling of his ankles; that during the engagements over there on one occasion he had his buddies killed beside him; on another occasion the entire squad was killed, he being the only one remaining, and the captain ordered him to return to his squad and he found there was no others remaining of those who filled the squad. There were eight in the squad, seven killed, he being the eighth one. That he has followed the instructions of the physicians, and he has taken liquid medicine and pills every since he first started taking pills because of those complaints prescribed to him by the medical officers in the army in France, continued that until he came home, and beginning with the first week in July, 1919, he has continued taking those liquids and pills as prescribed by physicians since that time; that he has undertaken work such as irrigation, plowing, pitching hay, working in the beet fields, other than that which we have submitted to you in the reports from which I read to you this morning, going out into the field, working an hour or two, coming back to the house, resting or lying down, sometimes lying down in the field beside the work because of his pains and suffering; that on several occasions he left the field and left the team standing in the field hitched to the eqipment and came to the house and somebody else brought in the team; in addition to the work I have called your atten-

tion to in the reports, he continued the operation of that farm,—or those farms, as I have stated, more or less constantly from 1922 to the present time. I call attention to these exceptions: In 1930, while he continued to reside on the place, he secured employment from a Mr. Fjelsted, his duties involving that of buying grain for which he received $130.00 a month for approximately two months, and thereafter and because of his inability to be consistently on the job due to these pains and suffering, arrangements were made whereby he received forty cents an hour for the actual hours he continued to work, that continuing thereafter for some three or four months; in another instance he was employed as city marshal of the town of Dayton, and received therefor twenty-five dollars per month as a salary, his duties being to look after the dance hall, watching out for the stealing of gasoline by the boys, and repairing the water pipe lines when they would spring a leak, but because of his pain and suffering, and inability to repair those leaks he was discharged from that employment after approximately four months employment there. On another occasion he went to Salt Lake City, that being in the spring of 1932, and has continued from that time to the present to more or less make his home there with his father-in-law, working at his father-in-law's plant under his brother-in-law's direction, being a wrecking,—a car-wrecking outfit, the employment arrangement being that he may work whenever able to work and be on the job, that there was always

work there for him but he didn't go to work on account of his pain and suffering, and his general inability to work, but that he did work there at occasions at twenty-five cents an hour, which netted him during that period of time earnings of approximately sixty dollars; that that is all of the earnings he has had since that time; that he has testified,—or the record shows that outside of these matters I have called to your attention he has made no earnings by his own effort other than the partial, or the help to the living while on the farm; and you may further assume that the wife in 1923 went on down to Provo, Utah, and secured employment as a school teacher working that year down there, and since that time has been engaged in teaching school for eight seasons, including the one I have just referred to, and that money thus received was their source of livelihood, and their means of living; that in addition to that they received free gifts and help from the brothers of both the wife and the plaintiff, and also help from the father in stocking the ranch without cost to them, and in labor performed on the ranch during haying and other seasons; that on one occasion, in 1922 or, rather, in 1923 one of the brothers came there in about July in order to relieve the hired man they were paying and continued to work until late fall until the crops were up, and without any charge whatever, he and other brothers frequently doing that thereafter; that on certain occasions they received help from other sources, as for instance, on one occasion while the

plaintiff was in the hospital at Boise, the Veterans Hospital, he received $35.00 from the Veterans Welfare Bureau as a gift, and aid; that throughout the period of time since he came back from the service, on or about May 1st, 1919, he has been on a diet until within the last few months; that he has constantly had poor rest at nights, primarily due to pain and suffering in connection with the process of urination, and the necessity for it; that he has not had a well day since his discharge, that is a day entirely free from the pain and suffering and aches that I have described; that he has not worked continuously through any one day since his discharge other than as listed in the report that I read to you this morning,—based upon those assumed facts, Doctor, coupled with your findings and your diagnosis, and based upon the definition that I have given you, do you have an opinion as to whether or not the plaintiff Glenn Perkins is, or has been, totally and permanently disabled?

THE COURT: Just answer that yes or no, Doctor.

A. Has been disabled, yes.

Q. You do have an opinion?

MR. GRIFFIN: We move that his answer be stricken as not responsive, if the Court please.

THE COURT: Stricken. That calls for a yes or no answer.

A. Yes.

Q. What is that opinion, Doctor?

MR. GRIFFIN: The Government at this time objects to any opinion on the part of this witness for the reasons and upon the grounds: That as our objection as heretofore been made, that he doesn't understand the definition of total and permanent disability, particularly the word "continuously," and on the further ground that any opinion given by this witness as to what occurred in 1918 or 1919 is an invasion of the province of the jury, and he is called upon to render an opinion involving the whole merits of the case.

THE COURT: Objection over-ruled.

Exception.

A. Total and permanent disability.

Q. And how long in your opinion has he been totally and permanently disabled, Doctor?

A. Since he left the service.

Q. And can you fix approximately that date, Doctor?

A. I think it was 1919, wasn't it?

Q. Taking those four disabilities, Doctor, the pyelitis, the cystitis, the arthritis, and the injured foot and hand you speak of, which you found in 1919, on November 10th, and assuming the definition of total disability, that is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and that such total disability shall be deemed to be permanent whenever it

is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it, and I will ask you whether or not in your opinion,—or first, do you have an opinion as to whether or not Mr. Perkins was totally and permanently disabled because of those disabilities at that time.

MR. GRIFFIN: If your Honor please, for the purpose of an objection, I would like to ask this witness a question.

THE COURT: Very well.

QUESTIONS BY MR. GRIFFIN:

Q. Doctor, what do you understand by a man being able to carry on continuously some substantially gainful occupation?

A. Why, I should think he should be able to put in sufficient time to reasonably carry out the business of his occupation. I think he should be in a position to do that without permanent injury to his health.

Q. Would you say that a man if he worked ninety per cent of the time would be totally disabled?

A. I should think that would depend on what he was doing.

Q. What have you in mind he might be doing? Suppose, Doctor, for instance, a man was a common laborer, if he could work ninety per cent of the time would you say he was totally disabled?

A. Well, the ordinary common laborer, a man that could work ninety per cent of the time would be as good as the average man, I would think.

Q. What would you say about a man that worked eighty per cent of the time?

A. That would be getting close to the margin, I should imagine.

Q. Suppose a man had a position as a watchman, or something like that, if he could work eighty per cent of the time, would you say he was totally disabled?

A. Well, if he had an important watchman's job he would surely have to put in eighty per cent of the time.

Q. If a man was able to do work for seventy-five to eighty per cent of the time in any ordinary physical work would you say he was totally disabled? That is what I am trying to get at.

A. Well, if he was able to do it without injury to his health, I should think that if he could perform seventy-five to eighty per cent of the working hours he was supposed to be on the job, that ought to be fairly reasonable. A man is likely to get sick, you know, and have to spend a few days off, even if he is in good health ordinarily.

Q. You say then that if a man could work seventy-five to eighty per cent of the time under this definition, he would be able to work continuously?

A. Providing there was no injury to his health.

MR. GRIFFIN: That is all.

DIRECT EXAMINATION RESUMED:

MR. LAMPERT: Will you read the question, please, Mr. Reporter?

(Question read by the Reporter.)

A. Yes, sir.

Q. (By Mr. Lampert;) What is that opinion, Doctor?

MR. GRIFFIN: We object to his giving any opinion, if the Court please, on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact to be decided by the Court and jury.

THE COURT: Objection over-ruled.

MR. GRIFFIN: An exception, please.

A. My opinion is that the man is and has been totally disabled from the time I saw him first, and that he will be totally disabled as long as he lives.

Q. Now, Doctor, you were present in Court when the hypothetical question was propounded, and heard the facts as there related, or the assumed facts?

A. Yes, sir.

Q. I will ask you to assume those facts, in addition to your own findings and diagnosis, and ask you to state based upon the opinion which you have heretofore given,

—or the interpretation as to permanent and total disability, whether or not you have an opinion as to any total and permanent disability existing in connection with Glenn Perkins at a time prior to your examination?

A. Yes, I believe I have.

Q. And what is that opinion, Doctor?

MR. GRIFFIN: If the Court please, we object to the witness giving that opinion on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact in issue here.

THE COURT: Objection over-ruled. He may answer.

MR. GRIFFIN: An exception, please.

A. My opinion is that he was disabled,—totally and permanently disabled for at least six months prior to the time I saw him.

(Service acknowledged)

(Title of Court and Cause.)

STIPULATION FOR SETTLEMENT OF BILL

It is hereby stipulated and agreed by and between the respective parties hereto as follows:

a. That the appellant waives its assignments of errors numbered I., II., III., VII., VIII. and IX.

b. That the appellee confesses error in respect of assignments of errors numbered IV., V., VI., and X., and consents that the judgment entered herein in the court below may be reversed and that the cause may be remanded for retrial pursuant to law and the practice of the appellate court.

c. That the cause may be reversed and remanded without notice to either party and without the appearance of either party either by brief or in person.

d. That the foregoing Bill of Exceptions has been examined by the respective parties hereto and contains all of the evidence adduced at the trial of this cause as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved and which are presented by the assignment of errors herein and all of the evidence presented to the jury bearing upon the questions involved in the assignment of errors, and that the same may be settled as defendant's bill of exception and that the judge of this court may sign the hereto attached certificate settling the said bill of exception.

DATED April 2, 1935.

J. M. LAMPERT,
B. W. OPPENHEIM,
J. B. MUSSER,
Attorneys for Plaintiff.
J. A. CARVER,
E. H. CASTERLIN,
Attorneys for Defendant.

(Title of Court and Cause.)

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

I, CHARLES C. CAVANAH, United States District Judge for the District of Idaho, and the Judge before whom the above entitled action was tried, to-wit, the cause entitled Glenn Perkins, plaintiff, v. United States of America, defendant, which is No. 851 of the Eastern Division of said District Court,

DO HEREBY CERTIFY that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the trial of said cause and the same are hereby made a part of the record herein; that the above and foregoing Bill of Exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record herein, which are necessary to present clearly the questions of law involved in the rulings to which exceptions are taken and reserved and presented by the assignment of errors, and which are all of the evidence presented to the jury bearing upon the questions involved in the assignment of errors, and is a true Bill of Exceptions as to said questions of law; that the above and foregoing Bill of Exceptions was duly and regularly filed with the Clerk of this Court and thereafter duly and

regularly served, settled and filed herein within the time allowed by law and the rules of this Court; that no amendments were proposed to said Bill of Exceptions excepting the same are embodied therein; that due and regular notice of the time of settlement and certifying said Bill of Exceptions was given and that the same was settled and certified during the trial term as extended for that purpose.

DATED at Boise, Idaho, this 2nd day of April, A. D., 1935.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

PETITION FOR APPEAL

Filed January 16, 1935

Comes now the above-named defendant, United States of America, and says that on or about the 24th day of October, 1934, this court entered judgment upon verdict of the jury in the trial of the above entitled cause against said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which errors will appear more in detail from the assignment of errors, which is filed with this petition.

And the petitioner further says that said cause was brought against said defendant under Title 38, Section 445, U.S.C.A.; that this appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice, and the said defendant in petition herein is acting under the direction aforesaid, and no bond for costs, supersedeas or otherwise ought, pursuant to Sections 869, 870, Title 28, United States Code, be taken or required.

WHEREFORE, the said defendant prays that an appeal be allowed in its behalf in the United States Circuit Court of Appeals for the Ninth Circuit of the United States for the correction of the errors so complained of; that said allowance operate as a supersedeas and no bond therefor or for costs or otherwise be required and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that citation issue as provided by law.

J. A. CARVER,
United States Attorney
for the District of Idaho.

E. H. CASTERLIN,
Assistant United States Attorney
for the District of Idaho.

FRANK GRIFFIN,
Assistant United States Attorney
for the District of Idaho.

A. L. FREEHAFER,
Attorney, Department of Justice.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

Filed January 16, 1935

Comes now the defendant in the above entitled cause and files the assignment of errors upon which it will rely upon the prosecution in the appeal for the above entitled cause, from the judgment made by this Honorable Court on the 24th day of October, 1934.

I.

The Court erred in overruling defendant's objection to the following question propounded to Dr. Curtis Bland, a witness for the plaintiff, to-wit:

> "Q. You may state your opinion as to whether the plaintiff will ever be able to follow any substantially gainful occupation with sufficient continuity to enable him to make a reasonable living.
>
> MR. GRIFFIN: We object on the ground it hasn't been shown that this doctor is qualified to answer a question as to whether or not a person can follow any substantially gainful occupation, no occupations have been called to his attention. It is a question which can be answered by a lay man as well as by an expert, and we object to his answering the question on that ground.
>
> THE COURT: Objection overruled."
>
> Exception.

"A. I do not believe he will be able to do that."

II.

The Court erred in overruling defendant's objection to the following question propounded to Dr. Curtis Bland, a witness for the plaintiff, to-wit:

> "Q. Assume, Doctor, that total disability means that condition of mind or body which renders it impossible for a disabled person to follow continuously a substantially gainful occupation, and assume that total disability shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it, state your opinion as to whether or not the plaintiff, Glenn Perkins, at the time you last observed and treated him, was suffering from permanent total disability.
>
> MR. GRIFFIN: We object to that at this time, if your Honor please, upon the ground it calls for an opinion on the ultimate fact to be decided by the jury, and that is an invasion of the province of the jury.
>
> THE COURT: Objection overruled.
>
> MR. GRIFFIN: An exception, please.
>
> A. He was."

III.

The Court erred in overruling defendant's objection to

the testimony of Dr. Ellis Kackley, a witness testifying on behalf of the plaintiff, to-wit:

"MR. GRIFFIN: If your Honor please, at this time we would like to question the witness as to his qualifications to answer that question.

THE COURT: Very well.

QUESTIONS BY MR. GRIFFIN:

Q. Doctor, you just heard the definition of total disability, do you recall that?

A. Yes, sir.

Q. What total disability is?

A. Yes, sir.

Q. You also heard when total disability becomes permanent,—you remember that?

A. Yes, sir.

Q. Now it says that total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain it shall continue throughout the life of the party suffering from it, and total disability is when you cannot carry on continuously any substantially gainful occupation. Now, what do you understand "continuously," to mean?

A. Daily.

Q. That means going on day after day, is that it?

A. Yes, sir; going on day after day.

Q. And if a man was a farmer in your opinion under that definition it would be necessary for him to work from six o'clock in the morning until eight o'clock at night?

A. He has to, if he can make a living on a farm.

Q. Is that your idea of continuous?

A. Yes, sir; I was raised on one.

Q. That is your idea of continuous?

A. Yes, sir.

MR. GRIFFIN: Now, if the Court please, we object to the doctor giving any opinion at this time for the reason that his idea of continuously under the definition upon which law suit is based is erroneous, and improper, and not according to what the word continuously means under that definition.

THE COURT: Wouldn't it be a question going to the weight of the evidence, when he says he understands continuously to mean day after day as applied to a man following the vocation of a farmer, from six o'clock in the morning until eight at night.

MR. GRIFFIN: He said he would have to work all day. He said he knew all about it. He said his idea of continuously would be that he would have to work all the time.

MR. LAMPERT: I dislike to interrupt, but he added the words, "to make a living."

THE COURT: It is somewhat difficult to ask the Court to pronounce a definition of what continuous

work on a farm is. There is nothing here except this witness' statement. You are asking me to give a definition of what continuous work on a farm is, that is, as to the number of hours that such work would have to be performed to be continuous. I don't think any court on earth can attempt to give a definition on that. We have to leave that to the weight of the evidence.

Men may differ on that, some may say we work continuously on a farm if you work six hours, some may say eight hours, and some twelve. They may have different ideas. For the Court to lay down arbitrarily a rule as to the number of hours of work on a farm that would constitute continuous,—I think that is a matter of the weight of the evidence. So far we have nothing in this case as to what would constitute continuous work on a farm, except a statement of the witness here. He fixes the hours, I think, between six in the morning and eight at night.

MR. GRIFFIN: May I ask a question or two more, if your Honor please?

THE COURT: Yes.

Q. (By Mr. Griffin:) Doctor, in any other line of occupation, taking waiting on table, or anything you could think of where a person is supposed to work eight or ten hours a day, suppose they were

only,—suppose they missed an hour a day, would you say they couldn't work continuously?

A. If he missed an hour, that wouldn't be very much.

Q. Would that be continuously,—would he be working continuously under your idea of the definition?

A. They couldn't be working continuously if they lost an hour.

Q. It would be necessary for them to work all the time? If a man was employed to work eight hours a day, under your idea of this definition he would have to work eight hours, is that it?

A. That would be my idea. If he were employed to work eight hours, then he would have to do that to fulfil his part of the contract.

MR. GRIFFIN: Now, if the Court please, the Courts have all held, so far as I have been able to find, that continuously means with reasonable regularity, and in the Hansen case they held it to be continuously if he worked seventy-five per cent of the time, that he worked continuously within the meaning of the definition. This doctor says here that a man has to work all the time, so far as he knows, in order to be working continuously under the definition which forms a basis of what is before the Court at this time.

MR. LAMPERT: If your Honor please, he is limiting it strictly to the word "continuously" without the balance of the definition, at a substantially gainful occupation, and he is taking an isolated case of what might be continuous in connection with a man working who is hired for eight hours a day, and he is asked whether or not if he lost one hour, if that would be continuous. He said no. That is quite a different thing from this definition which provides he shall work continuously at a substantially gainful occupation. The question is whether that combination is understood by the Doctor.

THE COURT: If we are going into the question of mathematics as to the number of hours each day that one must be able to work to constitute continuously, I am afraid we are going to get into a difficult situation, although I think in the Hansen case the Appellate Court held that where one was employed seventy-five per cent of the time from the period of discharge until the time the action was brought and worked from one-third to fifty per cent of the time that he wasn't totally disabled. That is what they held in that case. It is not strictly confined to the period in which he was employed; it is confined to the time he was able physically to function, as all we are determining is, what was the man's physical condition, physical ability. One may be employed and he may work ten hours a day, and

drops out, and doesn't actually put in that ten hours day after day, but he drops out often. The fact that he may be up ten hours a day to my mind is not the criterion in determining his physical ability, under the disability we are considering, but we have that mathematical determination in the Hansen case, and I am having difficulty in following it, in applying it to every case. The Courts are getting down to a mathematical situation, as they held in that Hansen case, and the Supreme Court denied certiorari in that case, as I recall it, just recently, and said that was the final opinion, and that is what we have in this Circuit. They denied certiorari the other day, as I read it in the newspaper.

MR. LAMPERT: That is correct.

THE COURT: We can't lay down the hard and fast rule as to the hours necessary to work during a day and apply it to all the occupations or vocations. Some are different. In determining what is reasonable regularity, I might say a bookkeeper worked with reasonable regularity if he worked six hours a day. We may go on a farm, and some one might say it takes longer; so you are putting up to the Court a question of fact, that to my mind has to be determined from the particular facts in order to accurately determine what is working with reasonable regularity. Now, the doctor's view here is that reasonable regularity means that he must work from

six in the morning to eight o'clock at night on a farm, to work with reasonable regularity. That is a question of the weight of the evidence. I will overrule the objection. I think you are getting the Court into deep water when you ask me to define that distinction between the different vocations. After all, it is a question of fact to be determined as to the particular occupation and vocation in each particular case. That is the only way I can get right to the bottom of things, not any arbitrary mathematical cut-off in any case. I can't reason that way. The objection will be overruled."

Exception.

A. That he was totally and permanently disabled.

IV.

The Court erred in overruling defendant's objection to the hypothetical question propounded to Dr. Ellis Kackley, a witness for the plaintiff, as follows:

"MR. LAMPERT: I will ask you, Doctor Cutler, to step forward, as I am about to present the hypothetical question. I would like to have you be seated inside the railing there where you can hear this question. It is the Court's desire, and it is the practice, that we propound the hypothetical question to the witness and to the other physicians at the same time to avoid repetition.

Q. Doctor, in addition to your findings and diagnosis, and the definition for total and permanent disability which I have given you, I will ask you to assume these facts, and wipe out from your mind any other facts than those I am now presenting to you in this assumed question,—I mean by that, other than your own findings and disagnosis: That this plaintiff had an education of two years in the high school,—was in his second year when stopping his education; that he was a farmer through training and occupation throughout life, had no other avocation or training other than that after the war, and that from about January 15th, 1921, to September, 1923, he was under instructions from the University of Idaho at Moscow for the period from January 15th, 1921 to about March 1st, 1921, in the forestry work, and from that period on to about September 1923 under training for agricultural pursuits on placement training, placed upon a ranch where he worked under supervision from about March 1st, 1922, to approximately September, 1923,—

MR. FREEHAFER: September 30th is the exact date.

MR. LAMPERT: If you will kindly insert there, Mr. Reporter, "to September 30th, 1923."

Q. —that he entered the military service on the ninth of August, 1917, entered the Marine Corps,

and served therein that service until he was honorably discharged on the 20th day of June, 1919, save and except that on November 1st, 1918, he received wounds while engaged in battle in the Argonne, as a result of which he was taken first to the field hospital, then the Red Cross Hospital, and then the Base Hospital, finally on to Brest, and transferred to the United States as a casual in March to Quantico, Virginia, and continuing as a casual he was finally sent back home on a furlough, arriving at his home near Pocatello, Idaho, on or about May 1st, 1919, remaining there until the formal discharge was issued to him at Salt Lake City on June 20th, 1919; that during this period of his military service he arrived in France on or about March 5th, 1918, and within three weeks began engagements in active warfare, continuing for about a week, and then was in training, finally landing in the permanent active front line warfare on or about June 1st, 1918, being at the Chateau-Thierry, Soissons, Toul, Champagne, and Argonne sectors; that during that time he inhaled gas, one time to the extent that he was caused to vomit, and vomited in the gas mask; that he received burns, gas burning in several of these engagements, and that these body burns continued with him to the present time, and have throughout the years; that the inhaling of the gas caused burning sensations in his

throat; that he was forty-six days under what he termed constant battle line work on one occasion, although he would have hours of rest at times, digging in to holes in the trenches, that he had during that period of time gone as long as,—well, he only had one change of clothes during that period of time, his clothes being wet much of the time, he being in water, standing in water much of the time; that during that period from about the first of June to the first of November, 1918, he was under much heavy shell fire, and a major portion of the time he was irregular with his meals, many days only receiving one meal; that on occasions he was without water for a considerable period of time, so that he became thirsty enough to on one occasion, at least,—yes, on two occasions to drink warm water from the cooling system of the German machine guns as they marched on into the German territory; that during the Chateau-Thierry engagement he was struck on the head with a flying object and became unconscious; that the injury I referred to as occurring on November 1st, 1918, was a shrapnel wound in the left foot, also in the left hand and left leg. He was not treated at the time for the left leg wound other than his own attention; the left hand wound was treated by a German prisoner on the way back to the hospital, and later treated in the hospital; the left foot was not given treatment

at the time although it was sore and swollen from the injury, and its first treatment was by a Doctor Sprague in Pocatello on or about January, 1920, who then operated upon it; that the gas burns or sores are the most noticeable on the chest, legs, face and neck; that while at the San Mihiel front, which was in September in 1918 he first had a lame, sore back, which has continued from that time until the present; that again in October at the Champagne front while urinating he experienced a hurting and burning sensation; that he found his urine was bloody, of a bloody color, and that hurting and burning sensation and the bloody color continued for a couple of days; that again in the base hospital,—after November 1st, 1918, when he was taken back to the base hospital he was bothered in the same way, and had the same pains and suffering and the lame back and hips, and the smarting and burning while urinating, and that these pains and this suffering has continued to date, not to the same degree of severity each and every day but constantly with him in some degree; that the urine was some times thick, not always bloody; that during the period of that warfare while wet and cold he had dull pains and aches and his arms became stiff, and that he still has dull pains and aches in his arms and shoulders, and that after he came to his home, within two or three days after his arrival, his mother's at-

tention being attracted by his complaint of pains in the back, she applied mustard plasters; that from that time to the present he has had frequent applications of mustard plasters, rubbing with turpentine, and massaging on his back by his mother, brother, or wife; that that has not been daily, but very frequently throughout the period of time, and that he also in 1919 upon the recommendation of a doctor at Preston he had and made use of what he termed a Johnson & Johnson kidney plaster, and they have been applied constantly from that time to this; that after he arrived home he had a yellow complexion, was thin, sunken cheeks, moved slowly, was nervous, would lie down and get up and move around in conversation; that in the month of June, 1919, he had what he termed a bad spell lasting for a couple of hours, having severe pains in the back, and in connection with the passage of urine; that during this period it was observed that he was bothered at night with getting up frequently and urinating, and that his urine was bloody and was stringy and pus-like, and this condition continued frequently from that time to the present; that the first week of July, 1919, he was given treatment for pyelitis, cystitis and neurasthenia by a medical official of this state who at that time found him under-weight, anaemic, tired, and exhausted, that he would get up in the morning still tired, suf-

fered from a kidney difficulty and pain in the back and tenderness and pain extending into the groin, an irritability of the bladder and frequent urination, and more or less discomfort at the time of urinating; that this pain, appearance, condition, pains and suffering that I have related as occurring on these occasions have continued throughout to the present time; that he has been treated, examined and given treatment by Doctor Bland, Doctor Cutler, Doctor States, Doctor Kackley, Doctor Sprague, Doctor Milford, of his own choosing, and in addition thereto has made trips to the Veterans Hospital at Boise, where he has been under examination in 1923, 1924, 1926, in 1929, 1930 and 1932; that in addition to that while at the University he received treatment by a Government doctor and for the same ailments, pain and suffering; that while there he was also sent for examination to a representative of the Government, a physician for the Veterans Bureau, or Public Health Service, in Spokane, that being in 1921, both of those instances; that on his arrival home he did no work during the months of May, June and July, remaining at his father's and mother's home near Pocatello; that following that he had approximately two months employment with the Forestry Department, receiving for his services there four dollars per day, that working consisting first of two weeks waiting orders at Hailey, Idaho,

and then the balance of the time as an assistant on a truck in connection with fire-fighting service up in the Salmon River country; that he came back from that service about October 1st, 1919, and then again remained around his home without any work, other than occasionally going over to the dairy herd,—dairy farm his father was operating, and at times aiding in the milking and the chores, that continuing until about January 15th, 1921; that thereafter he attended the University under the training I have heretofore referred to for forestry work, and later in placement training from February, 1921,—February, 1922 until about September, 1923, during which time he in addition to the studies at the University, which consisted of going to the University at about nine o'clock in the morning, remaining some days until twelve, other days maybe one hour or two hours in the afternoon, never more than three hours in the afternoon, and that he missed a few days in addition to those afternoons that I have referred to, otherwise taking quite regularly that course; that after he came back to the placement training,—that was upon the farm adjacent to the town of Dayton, where he had in connection with his operations two farms, one consisting of approximately eighty-four acres, which was in his name and owned by him, subject to a mortgage, which he had acquired before the war, and which

he lost by reason of the mortgage foreclosure on or about 1925 in the month of June, and in addition to that he had there two hundred and sixty acres, approximately, consisting of about fifteen acres of irrigated land, the balance dry farm, mostly in wheat, some in pasture; that during the time that he was there upon that farm and between the months of November, 1922, and September, 1923, he made reports as to his activities there, which include among other things the following: That he reported as to a total of 1158 hours up to March 24th, 1923, that being the winter season covering the first winter of 1922-1923, out of which time 570½ hours were devoted to doing chores, the chores consisting of milking from three to five cows daily, taking care of the stables, one team of horses, five young pigs, and nine chickens; that in addition to that he occasionally fed some other stock which was running out on the range, but to which he would occasionally throw hay. In addition to that he spent ninety-eight hours during that period of time in connection with repairs on a bar; forty-four hours repairing fences; fourteen hours plowing potatoes; six hours at lunch; "ten hours off today because of wife's health;" eighteen hours threshing; five hours hunting cattle; 89½ hours consulting with his counsellor, or supervisor on the ranch, the Government representative; 79½ hours studying, or read-

ing and studying literature in connection with farm operations, bulletins from the University, etc.; 59½ hours hauling hay; 76½ hours hauling manure; 84½ hours miscellaneous activities; three hours in connection with building or repairing a poultry house; that in the second period of time, that is, from the latter part of March, 1923, to September 29th, 1923, a period where he reported a total of 1775 hours of activity, 475 hours of the time being devoted to the doing of chores; five hours to hauling hay; 64 hours to hauling manure; 66 hours studying and reading papers and bulletins; 14 hours repairing buildings; 90 hours miscellaneous activities; sixteen hours calling on doctors, medical attention; fifty hours visiting and consulting with the agent or counsellor; 93 hours building and repairing chicken coops; 101 hours plowing and harrowing; 52 hours working on, or taking care of baby chicks; 77 hours repairing fences; fourteen hours drilling beets; 91 hours irrigating; 145 hours in field with beet thinners, and in that connection his labors there were supervisory, he doing none of the thinning; mowing and hauling hay 100 hours during the haying season; 162 hours hoeing beets; 100 hours cutting grain; 44 hours drilling grain; and sixteen hours cleaning weeds from the summer-fallowed land; that during that period of time and in the month of February and March 1923 he was in the

hospital at Boise for approximately two weeks, and that no reports as to activities were made from August 18th to September 22nd,—

THE COURT: We will suspend at this time. It is twelve o'clock. We will recess until one thirty, gentlemen;

12:00 Noon

1:30 P. M.

October 20th, 1934.

THE COURT: You may proceed.

MR. LAMPERT: Shall I continue, your Honor?

THE COURT: Yes.

Q. (Continued:) Doctor, I was referring at the time of the recess to the record of activities during his vocational training, closing with the placement period on the farm, ending on or about September 30th, 1923, and in connection with that, in addition to the reports as to the hours of activity and the nature of that activity I will add this additional information from the reports: This question is asked and answered by the plaintiff on the report as rendered, "Does your physical condition permit of satisfactory progress in this employment objective?" to twenty-

four times that question is asked he answered "Yes," sixteen times,—correct that, twenty-two times, and he makes no answer on the other two reports. The next question, "Are you satisfied with your progress and confident of becoming employable?" His answer to that, out of twenty-four times that the question is asked is affirmatively, yes, sixteen times, twice he fails to answer, and six times he makes approximately this answer, "Not satisfied. Insufficient instruction," and approximately that same language as to all six of those reports. I would also ask you to assume that beginning with a period at Chateau-Thierry, in addition to the pains in the shoulder, and from that time to the present he has had frequent swelling of his ankles; that during the engagements over there on one occasion he had his buddies killed beside him; on another occasion the entire squad was killed, he being the only one remaining, and the captain ordered him to return to his squad and he found there was no others remaining of those who filled the squad,—

MR. GRIFFIN: There was seven in number in the squad.

MR. LAMPERT: Eight; seven killed, he being the eighth one.

Q. —that he has followed the instructions of the physicians, and he has taken liquid medicine and

pills ever since he first started taking pills because of those complaints prescribed to him by the medical officers in the army in France, continued that until he came home, and beginning with the first week in July, 1919, he has continued taking those liquids and pills as prescribed by physicians since that time; that he has undertaken work such as irrigation, plowing, pitching hay, working in the beet fields, other than that which we have submitted to you in the reports from which I read to you this morning, going out into the field, working an hour or two, coming back to the house, resting or lying down, sometimes lying down in the field beside the work because of his pains and suffering; that on several occasions he left the field and left the team standing in the field hitched to the equipment and came to the house and somebody else brought in the team; in addition to the work I have called your attention to in the reports, he continued the operation of that farm,—or those farms, as I have stated, more or less constantly from 1922 to the present time. I call attention to these exceptions: In 1930, while he continued to reside on the place, he secured employment from a Mr. Fjelsted, his duties involving that of buying grain for which he received $130.00 a month for approximately two months, and thereafter and because of his inability to be consistently on the job due to these pains and

suffering, arrangements were made whereby he received forty cents an hour for the actual hours he continued to work, that continuing thereafter for some three or four months; in another instance he was employed as city marshal of the town of Dayton, and received therefor twenty-five dollars per month as a salary, his duties being to look after the dance hall, watching out for the stealing of gasoline by the boys, and repairing the water pipe lines when they would spring a leak, but because of his pain and suffering, and inability to repair those leaks he was discharged from that employment after approximately four months employment there. On another occasion he went down to Salt Lake City, that being in the spring of 1932, and has continued from that time to the present to more or less make his home there with his father-in-law, working at his father-in-law's plant under his brother-in-law's direction, being a wrecking,—a car-wrecking outfit, the employment arrangement being that he may work whenever able to work and be on the job, that there was always work there for him but he didn't go to work on account of his pain and suffering, and his general inability to work, but that he did work there at occasions at twenty-five cents an hour, which netted him during that period of time earnings of approximately sixty dollars; that that is all of the earnings he has had since that time; that

he has testified,—or the record shows that outside of these matters I have called to your attention he has made no earnings by his own effort other than the partial, or the help to the living while on the farm; and you may further assume that the wife in 1923 went on down to Provo, Utah, and secured employment as a school teacher working that year down there, and since that time has been engaged in teaching school for eight seasons, including the one I have just referred to, and that money thus received was their source of livelihood, and their means of living; that in addition to that they received free gifts and help from the brothers of both the wife and the plaintiff, and also help from the father in stocking the ranch without cost to them, and in labor performed on the ranch during haying and other seasons; that on one occasion, in 1922, or, rather, in 1923 one of the brothers came there in about July in order to relieve the hired man they were paying and continued to work until late fall until the crops were up, and without any charge whatever, he and other brothers frequently doing that thereafter; that on certain occasions they received help from other sources, as for instance, on one occasion while the plaintiff was in the hospital at Boise, the Veterans Hospital, he received $35.00 from the Veterans Welfare Bureau as a gift, and aid; that throughout the period of time since he

came back from the service, on or about May 1st, 1919, he has been on a diet until within the last few months; that he has constantly had poor rest at nights, primarily due to pain and suffering in connection with the process of urination, and the necessity for it; that he has not had a well day since his discharge, that is, a day entirely free from the pain and suffering and aches that I have described; that he has not worked continuously through any one day since his discharge other than as listed in the report that I read to you this morning,—based upon those assumed facts, Doctor, coupled with your findings and your diagnosis, and based upon the definition that I have given you, do you have an opinion as to whether or not the plaintiff Glenn Perkins is, or has been, totally and permanently disabled?

THE COURT: Just answer that yes or no, Doctor.

A. Has been disabled, yes.

Q. You do have an opinion?

MR. GRIFFIN: We move that his answer be stricken as not responsive, if the Court please.

THE COURT: Stricken. That calls for a yes or no answer.

A. Yes.

Q. What is that opinion, Doctor?

MR. GRIFFIN: The Government at this time objects to any opinion on the part of this witness for the reasons and upon the grounds: That as our objection as heretofore been made, that he doesn't understand the definition of total and permanent disability, particularly the word "continuously", and on the further ground that any opinion given by this witness as to what occurred in 1918 or 1919 is an invasion of the province of the jury, and he is called upon to render an opinion involving the whole merits of the case.

THE COURT: Objection overruled.

Exception.

A. Total and permanent disability.

V.

The Court erred in overruling defendant's objection to the question propounded to Dr. A. R. Cutler, a witness testifying on behalf of the plaintiff, to-wit:

"Q. Taking those four disabilities, Doctor, the pyelitis, the cystitis, the arthritis, and the injured foot and hand you speak of, which you found in 1919, on November 10th, and assuming the definition of total disability, that it is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substan-

tially gainful occupation, and that such total disability shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it, and I will ask you whether or not in your opinion,—or first, do you have an opinion as to whether or not Mr. Perkins was totally and permanently disabled because of those disabilities at that time."

"MR. GRIFFIN: We object to his giving any opinion, if the Court please, on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact to be decided by the Court and jury.

THE COURT: Objection overruled.

MR. GRIFFIN: An exception, please.

A. My opinion is that the man is and has been totally disabled from the time I saw him first, and that he will be totally disabled as long as he lives."

VI.

The Court erred in overruling defendant's objection to the question propounded to Dr. A. R. Cutler, a witness testifying on behalf of the plaintiff, to-wit:

"Q. I will ask you to assume those facts, in addition to your own findings and diagnosis, and ask

you to state, based upon the opinion which you have heretofore given,—or the interpretation as to permanent and total disability, whether or not you have an opinion as to any total and permanent disability existing in connection with Glenn Perkins at a time prior to your examination?

A. Yes, I believe I have.

Q. And what is that opinion, Doctor?

MR. GRIFFIN: If the Court please, we object to the witness giving that opinion on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact in issue here.

THE COURT: Objection overruled. He may answer.

MR. GRIFFIN: An exception, please.

A. My opinion is that he was disabled,—totally and permanently disabled for at least six months prior to the time I saw him."

VII.

The Court erred in overruling defendant's motion, which was as follows, to-wit:

"MR. GRIFFIN: Your Honor will recall that early in this case the question was brought up with reference to a disagreement signed, not by the director of insurance but by a regional manager, and

your Honor deferred ruling on that question until the end of the trial; and the defendant now moves that the case be dismissed for the reason and upon the ground that the Court has no jurisdiction for the reason that the claim denied as to this plaintiff was not denied by the director of war risk insurance Bureau, or someone acting in his name on an appeal to the Director, as required by Title 38, Section 445, United States Codes, Annotated.

MR. LAMPERT: May it be understood as having been agreed upon before starting the case that that is the identical matter ruled on by the Court in the previous matter,—that the same legal question would be raised?"

"THE COURT: The regulation passed by the director designating the local director to act in his person to pass upon the denial, if any, of these claims? That is this record, as I understand it?"

"THE COURT: Very well. The motion will be denied. I am not yet ready to reverse myself in my ruling.

MR. GRIFFIN: The record will show an exception?

THE COURT: Yes."

VIII.

The Court erred in overruling defendant's motion for

a directed verdict, which was as follows, to-wit:

"MR. GRIFFIN: If your Honor please, comes now the defendant, the plaintiff and the defendant having both rested, and moves the Court to direct a verdict in favor of the defendant and against the plaintiff for the reason and upon the ground that the evidence of the plaintiff is insufficient to show that he became totally and permanently disabled at a time when his war risk insurance policy was in full force and effect, or that he became permanently and totally disabled at all;

That the evidence affirmatively shows that he worked for a considerable period of time, and that he went to school at the University of Idaho, lost very little time while he was there; then he went down to his farm and the uncontradicted evidence here, the written testimony or evidence tends to show that he worked for thirteen and fourteen hours a day, and carried on the occupation there of a farmer all during that period of time.

The medical testimony in this case, so far as the plaintiff is concerned, is very unsatisfactory, Doctor Kackley frankly admitting that he could not have told in 1919 that this plaintiff was totally and permanently disabled. The other doctor they called stated that he in his opinion, in the first instance when he first examined him back in 1919, that his

opinion at that time was that he was not totally and permanently disabled.

Now, under this definition, and I think we have cases to support it, and these cases have been called to your Honor's attention before, that it is necessary in this kind of a suit to show that while the premiums have been kept up, that at that time there is reasonable grounds to believe that the plaintiff was totally and permanently disabled, and not taking any subsequent event, any events and matters that occurred after the lapse of the policy into consideration.

Now, the plaintiff signed his discharge when he left the army stating frankly there was nothing wrong with him. He hasn't denied that in this case, as they ordinarily do, in other cases. A doctor examined him at that time and found there was nothing wrong with him. Now, in this case it is necessary to have one of those long-ranged retroactive diagnoses in order to support the plaintiff's claim in this case, because there was no diagnosis in his service record of any kidney trouble or bladder trouble. That the only thing we have to base that on is the statements made by the lay witnesses and by the plaintiff himself that he had some pain in his back, and that he was exposed to rain and cold during the time that he was in France, but we don't have any medical testimony as to that until

Doctor Bland about 1919, I think, and I believe he says that these different ailments are curable, and he also says in his deposition that Mr. Perkins worked on his farm during that time, and we submit, if your Honor please, under the evidence here that the defendant is entitled to a verdict.

THE COURT: The motion will be denied.

MR. GRIFFIN: An exception, if the Court please.

THE COURT: Yes."

IX.

That the evidence is insufficient to show or to prove that the plaintiff became totally and permanently disabled while his policy of war risk insurance was in full force and effect, or at all.

X.

That the verdict and judgment are contrary to law.

J. A. CARVER,
United States Attorney for the District of Idaho.
E. H. CASTERLIN
Assistant U. S. Attorney
for the District of Idaho.
FRANK GRIFFIN,
Assistant U. S. Attorney for the District of Idaho.
A. L. FREEHAFER,
Attorney for the Department of Justice.
Attorneys for the defendant.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL

Filed Jan. 16, 1935.

Upon the petition for appeal, accompanied by Assignment of Errors, heretofore filed herein, it being made to appear that said Petition should be allowed and that appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice,

IT IS ORDERED that said petition for appeal be and hereby is granted and an appeal allowed.

DATED this 16th day of January, A. D. 1935.

CHARLES C. CAVANAH,
DISTRICT JUDGE.

(Title of Court and Cause.)

CITATION ON APPEAL
Filed Jan. 16, 1935.

THE PRESIDENT OF THE UNITED STATES TO GLENN PERKINS and to Oppenheim & Lampert and J. B. Musser, his Attorneys, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California within thirty days from the date hereof pursuant to Order Allowing Appeal regularly issued, and which is on file in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, in action pending in said court wherein the United States of America is appellant and Glenn Perkins is appellee, and to show cause, if any there be, why the judgment and proceedings in said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 16th day of January, A. D. 1935.

CHARLES C. CAVANAH,
U. S. DISTRICT JUDGE.

ATTEST:
W. D. McREYNOLDS, *Clerk.*
(Seal) *District Judge.*

(Title of Court and Cause.)

PRAECIPE FOR

TRANSCRIPT OF RECORD

Filed Jan. 16, 1935.

To the Clerk of the Above-Entitled Court:

Please prepare, certify, print, return and transmit to the Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, transcript of record in the above entitled cause, including therein

1. Complaint.

1½. Answer and Amendment thereto.

2. Court Minutes.

3. Verdict of Jury.

4. Judgment.

5. Bill of Exceptions.

6. Petition for Appeal.

7. Assignment of Errors.

8. Order Allowing Appeal.

9. Citation on Appeal.

10. Praecipe for Transcript of Record.

11. Acceptance of Service of Assignment of Errors, Petition for Appeal, Order Allowing Appeal, Praecipe for Transcript of Record, and Citation on Appeal.

12. Minutes or stipulation and order concerning and settling Bill of Exceptions.

showing in each case fact and date of filing and acceptance of service. Omit printing of title, court and cause and verification.

J. A. CARVER,
United States Attorney
for the District of Idaho.

E. H. CASTERLIN,
Assistant United States Attorney
for the District of Idaho.

FRANK GRIFFIN,
Assistant United States Attorney
for the District of Idaho.

A. L. FREEHAFER,
Attorney, Department of Justice.

(Title of Court and Cause.)

ACCEPTANCE OF SERVICE

Filed Jan. 17, 1935.

Service of

ASSIGNMENT OF ERRORS,

PETITION FOR APPEAL,

ORDER ALLOWING APPEAL,

PRAECIPE FOR TRANSCRIPT OF RECORD,

CITATION ON APPEAL,

is hereby accepted and receipt of copies thereof acknowledged this 17th day of January, A. D. 1935.

OPPENHEIM & LAMPERT,

J. B. MUSSER,

Attorneys for plaintiff.

(Title of Court and Cause.)

CERTIFICATE OF CLERK

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 83, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $108.40 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 16th day of April, 1935.

(SEAL) W. D. McREYNOLDS, Clerk.

No. 7750

United States Circuit Court of Appeals

For the Ninth Circuit

MUI SAM HUN, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

Appeal from the United States District Court for the Territory of Hawaii.

FILED

MAR - 8 1935

PAUL P. O'BRIEN,

BRIEF FOR APPELLANT.

E. J. BOTTS,
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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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No. 7750

United States
Circuit Court of Appeals

For the Ninth Circuit

MUI SAM HUN, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

MUI SAM HUN, the appellant, was born in Honolulu (R. pp. 24, 42 and 56) and went to China with his mother when he was four years old (R. pp. 26, 43). Appellant remained in China until his departure on the *S.S. President Coolidge* for Honolulu last July.

He was denied admission by a Board of Special Inquiry, after a fairly lengthy hearing. His appeal to

the Secretary of Labor being unsuccessful, he filed this proceeding in habeas corpus, which resulted in the court refusing to issue the writ and in remanding appellant to the immigration authorities for deportation (R. p. 79).

In order to give better understanding of this proceeding, it will be necessary to quote from the record, perhaps at some length.

Petitioner is thirty-two years old (R. p. 24); born in his parent's home on Hotel Street in Honolulu, May 5, 1902; his father's name was Mui Ow Gut alias Hoo Ung, a farmer by occupation who died in Honolulu when petitioner was two years old. His mother, Jow Shee (R. p. 25) took petitioner to China on the S. S. Mongolia in February, 1906 (R. p. 26).

We will now turn to the testimony of appellant's two witnesses, of whom the Board chairman was constrained to say:

> "It is but fair to state that the testimony of witnesses agrees in practically every detail with that of applicant in describing in detail the meetings they have had."
>
> (R. p. 58.)

It may not be amiss to add the comment that their testimony also agrees in every detail in regard to family history and in almost countless other details.

We quote the following from Lee Wai Shoon's testimony, the first witness (R. p. 42):

> "Q. What do you wish to testify to regarding Mui Sam Hun?

A. I know he was born on Hotel Street, Honolulu, T. H.

Q. How do you know that?

A. I used to know his father.

Q. What was his father's name?

A. Mui Ow Gut; his other name is Mui Hoo Ung.

Q. What was his father's occupation here?

A. He was a vegetable gardener.

Q. What became of him?

A. He died about 30 years ago. He would be 70 years old if he were living.

Q. How many times was Mui Ow Gut married?

A. Once, only, to Jow Shee; I don't know her full name.

Q. What became of Mui Sam Hun and Jow Shee after the death of Mui Ow Gut?

A. She took her son, Mui Sam Hun, to China when he was four years old."

(R. pp. 42 and 43.)

We will now turn to the testimony of the other witness, Wong Wah Heen:

"Q. Who is Mui Sam Hun?

A. The son of Mui Ow Gut.

Q. Who is Mui Ow Gut?

A. A man I knew in Honolulu 30 or 40 years ago.

Q. What other name did Mui Ow Gut have?

A. Mui Hoo Ung.

Q. What was Mui Ow Gut's occupation here?

A. He was a truck gardener.

Q. What became of Mui Ow Gut?

A. He died about 30 years ago in Honolulu.

Q. How old was he when he died?

A. 30 or 40 years old at the time of his death.

Q. Were his remains ever shipped to China?

A. Yes, but I don't know when.

Q. Was this man ever married more than once?

A. Only once.

Q. Describe his wife?

A. Name Jow Shee, 63 or 64 years old; has bound feet; now living at Lung Tow Wan Village, China.

Q. When did she go back to China?

A. At the age of 35 years, I don't know the year.

Q. Who accompanied Jow Shee, if any one, on her return to China?

A. A son, Mui Sam Hun.

Q. Did these people ever have any other children than this one son?

A. No."

(R. pp. 50-51.)

The fact of appellant's birth and departure was further corroborated by a steamship record in possession of the immigration authorities; the outgoing manifest of the *S.S. Mongolia*, sailing from Honolulu February 13, 1906. This manifest (which is in the nature of a secret document for use of immigration officers only) contains the following entry (R. p. 26):

"MRS. MUI; age 35 years; female; occupation wife; destination Hongkong.

SAM HUN; age 4, male, born in Hawaii, destination Hongkong."

Appellant on leaving Honolulu with his mother took up residence in Lung Tow Wan Village, where he continued to reside until 1934 (R. p. 27), when he started back to Honolulu. Both witnesses had made visits to China and the Lung Tow Wan Village, Lee Wai Shoon in 1933 (R. p. 42) and Wong Wah Heen in 1932 (R. p. 49). Both witnesses renewed their acquaintance with appellant and his mother, and the details concerning these reunions were fully and satisfactorily covered in the record (R. p. 58).

Lee Wai Shoon testified that he was visiting at the home of Joe Jow, his friend who resided in the village, who told him that Mui Sam Hun and his mother lived a few houses away (R. p. 44). While he was still at Joe Jow's house, Jow Shee, appellant's mother, called and later led the witness to her nearby home, where he met appellant.

Wong Wah Hoon, who was in the village during his last visit to China (R. p. 52), looked up appellant's mother and visited her, as an old friend (R. p. 37).

Many were the questions asked these witnesses and appellant (R. pp. 35, 37, 52) regarding these meetings, the village and appellant's occupation, the location of his house, etc., etc., and the Board finally acknowledged that their testimony "agrees in practically every detail" (R. p. 58).

II.

ERRORS RELIED UPON.

The errors assigned (R. pp. 82-84) are seven in number. In different ways they state the proposition that petitioner, having met the burden of proof cast upon him by the Chinese Exclusion Act, the action of the Board in denying him admission was arbitrary and unfair and, under the circumstances, the refusal of the court to issue the writ was error.

III.

ARGUMENT.

We have seen that appellant's testimony of Hawaiian birth and departure as an infant from Honolulu did not rest upon his own unimpeached and entirely credible testimony but was corroborated by the evidence of two witnesses, Honolulu friends of his parents who in recent years had renewed acquaintance with appellant and his mother in China, and was, moreover, corroborated by an official steamship manifest record, to which appellant and his witnesses could in no way have had access.

On what, then, it will be asked, did the Board base its excluding order? No witness was contradicted or impeached, and obviously appellant proved his case by more than a fair preponderance of the evidence; and yet the Board in the face of the evidence denied appellant admission.

Assigned Reasons For Denial.

Why? Two specific reasons were assigned:

(1) That the witnesses, Lee Wai Shoon and Wong Wah Heen, in returning from China in 1933 were asked the usual routine questions by an inspector aboard ship as to whether they had seen any resident or former resident of this country during their recent stay in China; and they had answered, No. Wong Wah Heen stated that he was never asked that question, or if asked he didn't hear it (R. p. 54), and Lee Wai Shoon said he forgot about it (R. p. 46). "I forgot about my steamer ticket also". Of course every Chinese returning from a visit to China in the course of such visit, in Hongkong or Shanghai or the villages, has seen many "residents or former residents of this country." It couldn't be avoided; and it is distinctly unfair to try to use this omnibus slapdash shipboard inquiry against their credibility when later they appear, as a witness for some one their attention was never called to and they did not have in mind when asked the stupid question. If, after a visit to New York and San Francisco, the writer of this brief were asked by an immigration officer as the ship rested at quarantine, to name the "residents or former residents" of Hawaii he had met on the mainland, he would make a sorry mess of it. He would probably do as these Chinese witnesses did and as most of them do, answer in the negative to get the silly business over with as quickly as possible.

"These witnesses", said the Board in dismissing their evidence, "destroyed the effectiveness of their

own testimony, however, by having failed to state that they had seen any such person as appellant on their recent visits to China when questioned on this point aboard ship on their return from their respective visits" (R. p. 58).

There is neither rhyme nor reason to this shocking refusal to give the appellant the benefit of their testimony. One of the witnesses, it will be recalled, said he was never asked the question, or if asked, in the shipboard bustle of docking he did not hear it and the other witness said the matter slipped his mind, as well it might in his eagerness to clear the immigration officers and get ashore. The questions and answers given aboard ship were apparently never shown to the witnesses thereafter nor were they in a calmer moment allowed an opportunity to amplify or correct them, a thing which every requirement of fairness demands, if interrogations of this sort are to be used as the basis for attacking their credibility.

(2) That the witnesses did not recall all the details of testimony they had given in former cases. We submit this is a far-fetched strained effort to discredit testimony. Lee Wai Shoon, who is 60 years old (R. p. 41) was shown a photograph of Lee Tai Soon taken 14 years ago and correctly stated his name, with allowance for variation in spelling (R. p. 46). Then:

> "Q. Do you remember testifying for this man on his arrival from China some years ago?
>
> A. Yes.
>
> Q. What was his father's name?
>
> A. I think it was Lee Sing Chang or Lee Fat Kai."

This apparently being correct, he was shown another photograph.

> "Whose photograph is that? (Indicating photo of Leong Tom See in Honolulu file 4382/1868 found on affidavit dated Jan. 13, 1923).
>
> A. That is Leong Tom See.
>
> Q. What was his father's name?
>
> A. I don't remember now.
>
> Q. What was his mother's name?
>
> A. I don't remember that.
>
> Q. How many brothers and sisters did he have?
>
> A. He is the only child in the family.
>
> Q. For your information I will say that the answers you gave to these questions when you were examined in this office on December 12, 1921, were entirely different.
>
> A. I can't remember—it was over ten years ago."

We rise to a point of order as to the accuracy of the statement contained in the last question of the chairman. The witness had correctly stated the man's name, Leong Tom See, had said he could not recall the names of his parents and that Leong Tom See was the only child in the family. There was only one statement of fact in this interrogation which could possibly be wrong, i. e. whether there was more than one child in the family; and we have no way of knowing that that was wrong. If it is a matter relied upon to discredit the witness, it must be in the record not only for the information of the Secretary but also the courts (*Kwock Jan Fat v. White,* 253 U. S. 454, 40 Sup. Ct. 566).

We turn now to the testimony of witness, Wong Wah Heen, on this same subject:

> "Q. Indorsements on your certificate of residence show you have been a witness before this service on numerous other occasions other than those in which you testified for your immediate family; are you able at this time to give the same testimony you gave on the various occasions you have appeared in other nativity cases before this service?
>
> A. I am too aged."
>
> (R. p. 54.)

This takes the policeman's derby as being one of the most stupid questions ever asked by a Board chairman. Certainly, he could not recall at this time all the testimony he had given in other cases, but what witness could? The effrontery of suggesting that he is a perjurer and crook because he answered that question in the way he did! What other truthful answer could he give? If the Board had a suspicion that Wong Wah Heen was a professional witness who had borne false testimony in various cases, the way was open for it to test its suspicions by proper interrogation, but it didn't deign to do so; and it didn't because it knew he was speaking the truth, as was Lee Wai Shoon.

We submit, the Board's refusal to give the evidence of these witnesses any credit, first because on returning from China in 1933 they did not mention having met Mui Sam Hun, and second because of their "admitted inability to recall data concerning other

nativity cases in which they have testified", was arbitrary and unfair and the Board's summary in this respect is false and biased (R. p. 58). Neither witness was asked a question which would warrant any such statement. Wong Wah Heen (R. p. 54) was asked if he could "give the same testimony" given by him on various occasions when he had appeared in other nativity cases. An affirmative answer would have involved a feat of memory, and as Wong had been in the Territory 40 years (R. p. 49) a considerable feat. As for Lee Wai Shoon, he was merely asked how he accounted for his "positive testimony" (R. p. 47) in past cases in which he had appeared as a witness, and he answered that he remembered at the time of giving his testimony the matters covered by his evidence. The point he was trying to make was that the lapse of time plus his advancing years made it difficult to recall in detail testimony he had given from time to time, in cases in which he had appeared as a casual witness. The same, of course, would be true of any other witness under the circumstances, however respectable, when denied an opportunity to refresh his memory. Of the two cases specifically called to his attention (R. p. 46) he did very well, especially considering the facts contained in them had not been called to his attention for from 13 to 11 years. There is no way of knowing what sort of testimony he gave in these cases and whether it was on some slight inconsequential point, or otherwise.

The Board takes the position that a witness has no right to refresh his memory, or, if he does, his tes-

timony is to bear the badge of perjury. Naturally, neither of these witnesses, who, before going to China, had last seen appellant as an infant of four years. would be able to recognize him when grown to manhood, and they didn't claim to; but they did know his mother and re-met appellant in her home, and no doubt the conversations they had with her refreshed their memories to some extent. But at least this can be said: when thus refreshing their memories, it was with no idea of serving as witnesses for appellant; for, of course, if they had gone there to talk matters over with his mother with a view of testifying, the first thing they would have said to the immigration officer in Honolulu quarantine was that in China they had met Mui Sam Hun, and thus pave the way for their subsequent testimony. If these witnesses refreshed their memories, they had a right to do so, a right uniformly accorded all witnesses, without regard to race.

> "The same fairness and impartiality should govern in considering and weighing the testimony of persons of Chinese descent who claim to be citizens of this country, as are given to the testimony of other class of witnesses."
>
> *Ching Hing v. U. S.*, 24 Fed. (2d) 523;

also

> *Yee Chung v. U. S.*, 234 Fed. 126;
> *Woey Mo v. U. S.*, 109 Fed. 888.

Real Reason For Denial.

The two reasons assigned and commented on above were in fact only a smoke screen to conceal the real

reason for the action of the Board in denying appellant. This was an unfounded suspicion, utterly unsupported by evidence, which we will now discuss.

"Incidentally" said the chairman (R. p. 57), approaching the discussion of this "reason" "this is the third case of this character presented to this office in the last few weeks in which the exact English date of departure is given of an alleged native who has lived in China for many years. These three cases are parallel in many other particulars, and it would seem to have been prepared by the same source. This last is mentioned in passing without being considered in summing up the evidence."

What chance has an applicant for admission to meet such a poisonous, malevolent statement? Some puzzling rule of vicarious responsibility is invoked against him concerning unnamed cases with which he is in no way identified and the disposition of which remains wholly undisclosed. With almost childish naivete, tongue in cheek, the chairman concluded by disclaiming that the suspicions expressed in the quoted paragraph had been considered by the board members in "summing up the evidence". He did not say, however, that it was not considered by the Board in refusing to credit appellant's testimony and in denying him admission. Why, they considered nothing else; they cared naught for the evidence or anything else but this silly and fantastic notion, which they followed around like three blind men following a dog. It bore no more relation to reality than Edgar Allen Poe's mad dreams. It was inserted into this

record for a specific purpose—and that purpose was to destroy appellant's chance of success on appeal to the Secretary. It rendered the hearing unfair. And an unfair hearing cannot be made fair by cheap disclaimers that prejudicial and improper matters inserted into the record were not considered by the Board in "summing up". Appellant had a right to an orderly hearing conducted "not arbitrarily and secretly, but fairly and openly, under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their race or origin" (*Kwock Jan Fat v. White*, supra).

Court's Erroneous Comment and Opinion.

In the course of the Judge's decision, he said:

> "It is peculiarly noticeable that the facts *which all particularly remember* are such facts and dates as appear on the outgoing manifest of the *S. S. Mongolia* sailing February 13, 1906." (R. p. 72.)

This statement, with all that it implies, is utterly untrue, and illustrates the point frequently made that a prejudiced administrative hearing inevitably carries its evil influence into court when review is asked.

In the first place the witnesses did not *"all particularly remember"* the facts and dates on the manifest. The witnesses didn't know anything about any dates at all or the ship on which appellant sailed or the time of sailing. While in China one witness, Wong Wah Hoon, was told by Jow Shee that she was 35

when she left here (R. p. 51) and the other witness, who didn't profess to know anything about the woman's age, testified to the boy's age when he left here (R. p. 43). Appellant himself was the only one who testified as to his departure on the *S. S. Mongolia* and the date, and he naturally came here prepared to give this information, always required of returning natives.

The comment of the court also implies that the witnesses did not "particularly" remember anything else but data contained in the manifest, which, of course, is as incorrect as the direct statement, for the witnesses remembered "particularly" a host of things germaine to the inquiry, which even the feverish Board could not attribute to privity with the manifest. They testified "particularly" to the town of appellant's birth, the street, his father's name, occupation, death, removal of body to China, mother's bound feet, her native village, location of her home and various other details too many to enumerate here.

The trial Judge must have been aware that this statement we have quoted was grossly unfair and incorrect. Can it be that he has grown to believe such statements may be made with impunity so long as only Chinese are involved,—that the insistence of appellate courts on the presumption of innocence and good faith, in these cases, is to be taken with a wink and a grain of salt? The Judge blithely presumes fraud, in effect, at least. * * *

The court also makes adverse comment on the inability of appellant to give the years of various hap-

penings (R. p. 71) affecting his life, but when the record is read it will be seen that this is really not so. He, of course, was dealing with the difficult Chinese calendar. The record can speak for itself on this point (R. p. 32).

The court (R. p. 71) stated that the burden of proof in this case is on appellant and he must show *"by clear and convincing proof"*, his right to admission. In this statement, we believe, the court erred. It has been uniformly held that an applicant for admission need make out his case by no more than a fair preponderance of the evidence (2 *C. J.*, 1103; *Woo Jew Dip v. U. S.*, 192 Fed. 471; *U. S. v. Hung Chang,* 134 Fed. 19; *Re Wong Toy,* 278 Fed. 562).

"Clear and convincing evidence" or "clear and satisfactory evidence" as it is sometimes phrased, means

> "a degree of proof greater than a preponderance of evidence, and such as was necessary to establish fraud."
>
> *Chicago, R. I. & P. Co. v. Nebraska State Ry. Com.*, 124 N. W. 477, 85 Neb. 818.

Perhaps the court confused this case with deportation proceedings against a Chinese lawfully admitted by a Board, where fraudulent entry is claimed. Of course, in such cases—or practically any case when fraud is insisted upon—the evidence must amount to "clear and convincing", "clear and satisfactory", or "clear and cogent" proof of the thing alleged. This is elementary.

In *Ex parte Cheung Tung*, 292 Fed. 997, Judge Dietrich in habeas corpus proceedings discharged petitioner saying:

> "* * * fairly weighed the evidence as a whole overwhelmingly supports petitioner's contention of his relationship to Cheung Fu. Were the question a material issue in a criminal case, it is quite inconceivable that, even with the rule of reasonable doubt, a jury would hesitate to so find."

See, also,

U. S. v. Chu Hung, 179 Fed. 564;
Woo Jew Dip v. U. S., 192 Fed. 471;
Johnson v. Damon, 16 Fed. (2d) 65.

In *Gung You v. Nagle*, 34 Fed. (2d) 848, this court held that the rejection of testimony in that case was arbitrary and improper and ordered the writ to issue. The court made it clear that testimony of Chinese is to be weighed in the same scales as that of other witnesses.

In *Hom Chung v. Nagle*, 41 Fed. (2d) 126, this court considered the case of a Chinese boy who, returning to the United States, was denied admission because of certain discrepancies. In reversing the action of the administrative officers, this court said:

> "The inferences derived from the evidence are overwhelming that the applicant and his father were familiar with the same village and with the same home and family. Discrepancies which existed between them are fairly attributable to the

frailty of human memory, the method of examination, and the difficulty of language; and do not *fairly indicate* a deliberate conspiracy to obtain a fraudulent entry into the United States *as must be the case if the testimony as to the relationship is false.*"

This thought, that exclusion based upon discrepancies *connotes a finding of affirmative perjury and fraud* on the part of the witnesses not directly attacked or impeached, is stressed in many cases; and it is being, of late, more and more emphasized, that uncontradicted and seemingly persuasive direct evidence of witnesses is not to be lightly termed perjury. And it is directly held, in this same connection, that the "presumption of innocence" applies in these cases with respect to alleged "fabrication of testimony" (*Gung You v. Nagle,* (9th C. C. A.) 34 Fed. (2d) 848, par. 3 of syllabus).

In June, 1929, this court in a given case, held that the conclusion of a Board of Special Inquiry that certain applicants had not established citizenship, which conclusion was based on certain discrepancies in the testimony, was arbitrary and capricious and without any support in the testimony (*Wong Tsick Wye v. Nagle,* (9th C. C. A.) 33 Fed. (2d) 226. See also *Johnson v. Ng Ling Fong,* 17 Fed. (2d) 11; *Nagle v. Ngook Hong,* 27 Fed. (2d) 650; *Gung You v. Nagle,* 34 Fed. (2d) 848; *U. S. v. Day,* 37 Fed. (2d) 36; *Whitfeld v. Hanges,* 222 Fed. 745; *Flynn v. Tillinghast,* 62 Fed. (2d) 308).

In conclusion we respectfully submit that the evidence overwhelmingly established the right of appel-

lant to admission; that there is not a single discrepancy in the whole record, and that the denial of appellant was inspired by bias, prejudice and impalpable suspicion; and the refusal of the trial court to grant the writ and the relief prayed for herein under the circumstances was error which should be rectified on appeal.

Respectfully submitted,

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No. 7750

United States Circuit Court of Appeals

For the Ninth Circuit

MUI SAM HUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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No. 7750.

United States Circuit Court of Appeals

For the Ninth Circuit

MUI SAM HUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

This is an appeal from the refusal of the District Court to issue a writ of habeas corpus in behalf of a Chinese, Mui Sam Hun, excluded by a Board of Special Inquiry from admission to the United States. He asserted birth in the Territory of Hawaii. The error

assigned presents a single issue: Is the applicant's "proof" of Hawaiian birth such that the failure of the Board to be moved thereby constituted a manifest abuse of discretion? (*Chin Ching v. Nagle* (9th C. C. A., 1931), 51 F. (2d) 64.) Or, to adopt the language of this Court: Does the evidence so conclusively establish the identity and birthplace of claimant that the order of exclusion should be held arbitrary or capricious? (*Jue Yim Ton v. Nagle,* 1931, 48 F. (2d), 752.)

1. What claim did the applicant make?

Mui Sam Hun, assertedly 32 years of age, arrived at the Port of Honolulu on July 27, 1934, claiming birth in Honolulu on May 5, 1902, and departure therefrom at the age of four (4) years, with his mother, on February 13, 1906, on the SS. "Mongolia". He stated that his father had died in 1904, in Honolulu. His only recollected residence was in Lung Tow Wan village, China, where his wife and four children remain. He had obtained for steamship purposes an affidavit executed by Mui Gum Yet in Honolulu on March 9, 1934, certifying the birth of "Sam Hun Mui" "in the Territory of Hawaii in the year 1902" (R. p. 64). This was the only documentary evidence of his birthplace and identity which he offered. He stated that he had no brothers or sisters, no family photographs, no surviving uncles or aunts—in short, no living relative save his mother, Jow Shee, in China.

2. **What proof did the applicant propose to offer?**

First, necessarily, the applicant by his own testimony could afford the Board no very definite assurance of his alleged birthplace. He assertedly left Hawaii well before the age of recollection. In this respect, he is not to be distinguished from those of his race born and bred in China. Since he must assert the fact at issue upon the authority of others, his oath on that point could have no validity. His asseveration, no matter how positive, cannot render him liable in law; it does not, in consequence, satisfy the requisites of proof. "He could not possibly know the fact": *Ex parte Chin Hin et al.*, 1915, 227 Fed. 131, 133. "From the very nature of the issue he could have no positive knowledge upon this point": *Ark Foo v. U. S.* (2nd C. C. A. 1904), 128 Fed. 697. And *Chin Lund v. U. S.* (6th C. C. A. 1925), 9 F. (2d), 283, 284, citing *Lee Sim v. U. S.* (2d C. C. A.), 218 Fed. 432, 435, suggests the incompetence of such testimony. The Board's rejection of this element of the applicant's proof, therefore, was not arbitrary, nor "evidence of unfairness": *Wong Fat Shuen v. Nagle* (9th C. C. A. 1925), 7 F. (2d) 611.

The applicant named two witnesses. He stated there were no others who could testify in his behalf (R. p. 34). It then developed that he had seen each of these witnesses on one occasion only in his lifetime for a period of ten minutes, within the past two years; and that each witness had last seen him, admittedly, if at all, as an infant in Honolulu (R. pp. 34-37).

3. At this juncture the Board faced a situation fraught with difficulties that have not escaped the sympathetic attention of this Court (*Wong Fook Jung v. Weedin*, 1926, 15 F. (2d) 847):

> "When we consider the ease with which an impostor could set up the claim made by appellant, the difficulty, if not the impossibility, of refuting it, and the fact that for 40 years he has resided in China, is married, and has grown children, but has never before sought entry into the United States, or taken any steps to establish citizenship, we think the testimony must be scrutinized with great care, and, doing so, we concur in the conclusion reached by the lower court that appellant has not sustained the burden of proof; at least, upon such a record the courts cannot with propriety disturb the finding of the immigration officials to that effect."

II.

THE RECORD BEFORE THE BOARD OF SPECIAL INQUIRY.

1. What does a scrutiny of the applicant's own testimony reveal, heeding the admonition of "great care?"

(a) First, there is a serious lack of information and absence of corrobative proof. He gave no account of what his mother would have told him, if his claim were true, concerning his life in Hawaii. Indeed, if she had that information, it is fair to presume that a reasonable man, approaching a situation requiring him to prove his claim of American birth, would have fortified himself with some details from that mother, who still lives. Instead, he was unable to tell the

Board when his father died except "during 1904"; he asserted the remains were moved to China, but when and by whom he did not know (R. p. 25). He even pretended not to know where his father was born: "In China, I don't know where" (R. p. 28).

Note with what difficulty the Board finally obtained from an unwilling witness the place of his father's birth (R. pp. 28-29):

> "Q. How did your mother come to settle in Lung Tow Wan village on her return to China?
>
> A. That is my paternal grandfather's village * * *.
>
> Q. If Lung Tow Wan was your paternal grandfather's village, was it not also your father's village?
>
> A. Yes.
>
> Q. Are you positive your mother was born in the same village as your father was born?
>
> A. I believe it is, I don't know.
>
> Q. Is it not an unusual thing for a Chinese not to know what village his father comes from in China?
>
> A. My father died when I was a small boy and I wouldn't know about it.
>
> Q. Was or was not your father from Lung Tow Wan village?
>
> A. I am not sure—I think he was."

This applicant offered no proof of this alleged parent's death, and although one witness said the father was buried "at Manoa" (R. p. 43), a Chinese cemetery in Honolulu, no effort was made to produce this burial record, or to ascertain its availability. Thus

even this slender corroboration is withheld from the Board. Why?

(b) *Was the testimony of the applicant credible?* (1) It will be observed that he gave the date of his birth by our calendar reckoning (R. p. 24), although he knows no English. He was asked (R. p. 25): "Q. What is the Chinese date for your birth?" He answered: "I don't know. My father told me I was born May 5, 1902." *But his father had died when the applicant was assertedly two years of age?* Again, he gave the exact English date for his 1906 departure (Chairman's Summary, R. p. 57). But as to even the *year* of his marriage, and the *years* of his children's birth he was unable, or refused, to state the same, either in Chinese or American reckoning (R. p. 32). What then was the source of applicant's information of the American calendar date for his birth and departure, of which he himself had no independent knowledge? Certainly not his father, as claimed. But this was not the only indication of a fabricated claim which rendered the Board suspicious, and therefore rightfully doubtful.

(c) He was shown the affidavit of Mui Gum Yet (R. p. 39). He did not know who made it. He was told the affiant's name, as asked: "Q. Did you ever hear of or know of a man by that name?" The record is (*ibid.*):

> "A. No. (changes) My mother told me there was a man by that name living here who had never been to China; I don't know him personally."

Yet the second witness said (R. p. 53): "Q. Do you know whether or not Mui Gum Yet really knew the applicant as he claims? A. Yes, I do."

2. There is, therefore, this difficulty in the record.

When the witnesses offered by the applicant proved unsatisfactory, the Board made every effort to locate Mui Gum Yet, the affiant of March 9, 1934, whose sworn statement made in Honolulu had been forwarded to China for the applicant's use in obtaining steamer passage. Gum Yet, at least, had registered an unreserved oath; here was one witness who had risked responsibility in law. But he was discreetly not available. The second witness is asked (R. p. 53):

> "Q. Do you know a man in Honolulu named Mui Gum Yet?
>
> A. Yes, he is a man about my age, but he is probably on the island of Molokai, from what I have heard, planting pineapples. * * *
>
> Q. Why was he not produced as a witness?
>
> A. I don't know—he is planting pineapples.
>
> Q. Can we reach him in any way?
>
> A. *No, he is an itinerant—I don't know where he is located.*"

Yet this itinerant four months earlier was located by the applicant's mother, assertedly through correspondence from China (R. p. 39). This Court has held that the failure of a claimant to call a possible material witness reasonably raises a presumption against the *bona fides* of his claim: *Hung You Hong v. U. S.*, 1933, 68 F. (2d) 67.

3. Was the Board arbitrary in refusing to be moved by the attempted assurance of the witness Lee Wai Shoon?

At the outset it will be noted, with respect to both witnesses, that the Board was afforded little background on which to seek cross-corroboration. The visit of each witness was limited to a single ten minute occasion. No detailed knowledge, then, could be expected of them concerning applicant's residence and family in Lung Tow Wan. There were no surviving relatives to check upon. The record was bare of all facts, except a few easily concocted and remembered, outside of the departure-manifest record. And yet there were discrepancies.

(a) Lee Wai Shoon came to Hawaii in 1894, and first returned to China in 1933. He claimed to have known an infant son of one Mui Ow Gut, who died "here about 30 years ago" (R. p. 43). This witness did not state any facts which were not comprised in the meagre testimony of the claimant. *It affirmatively appeared that from 1906 to 1933 he had no knowledge that the widow and her child of the said Mui Ow Gut had left Hawaii.* Thus (R. p. 43):

> "Q. What became of Mui Sam Hun and Jow Shee after the death of Mui Ow Gut?
>
> A. She took their son Mui Sam Hun to China when he was four years old.
>
> Q. Do you know about the date of their departure and the ship?
>
> A. No.
>
> Q. How do you know that these people went back to China when the applicant was four years old?

A. *Because some of their neighbors told me after I had arrived in China on my visit.*"

(b) This witness contradicted the applicant on the one slender point where their testimony met concerning the ten minute visit "between 10 and 11 o'clock in the morning" only a year before. This witness says (R. p. 44):

> "A. I happened to call at the home of Joe Jow who told me that a few houses from his in the same village resided Mui Sam Hun, the son of Mui Ow Gut. While I was at Joe Jow's house Mui Sam Hun's mother came to the door *and was introduced and she led me to her house and there I saw Mui Sam Hun.*"

Now the applicant had said (R. p. 35), "* * * he came to my house to visit my mother, who is his friend." It is submitted that these two statements do not relate to the same state of facts.

(c) Should this witness' asserted identification of the claimant as the infant known in Honolulu before 1906 have been accepted by the Board? First, the witness did not recall the mother; they were "introduced". He could not of course recall the infant in the man (R. p. 45), and so stated: "If his mother had not told me I would not have known (him)". Conceding that Wai Shoon did know Jow Shee in 1904, and that he was in good faith—how was the Board protected against an imposition by the mother upon this witness? How was the witness to know, and the Board to determine that Jow Shee had not foisted

a child of Chinese birth (either her's born after 1906, or another's) upon a credulous and willing old man, with a failing memory? "Things which happened 2 or 3 months past I *can* remember" (R. p. 47). It is submitted that the executive Board was not required to indulge in speculation and supposition; and that its refusal to do so cannot be stigmatized as bias or prejudice. This, it is believed, the Ninth Circuit Court of Appeals has determined, and also the Supreme Court: *Hung You Hong v. U. S.,* above; *Tang Tun v. Edsell,* 1912, 223 U. S. 673.

(d) It is clear that the capacity of this witness' memory became highly material. Appellant complained that the Board elected to test Wai Shoon's recollection (and possibly his credibility), by ascertaining if he could confirm his earlier testimony on major points in other cases before the Immigration Service at Honolulu. It appeared that of about ten such cases, two particular files were used, Nos. 4382/1312 and 4382/1868 (R. p. 46). Of his explanation that he remembered then but had forgotten now, the Board only commented that it "destroyed the effectiveness of his testimony" (R. p. 58), meaning perhaps whatever effectiveness it could have, even if believed. This appraisal, and the right to make it, would seem to be within the province of the Board; and not to be characterized as "the effrontery of suggesting that the (witness) is a perjurer and a crook" (Appellant's Brief, p. 10).

(e) But appellant seeks to impose a more serious misapprehension. He implies (Brief, p. 9) that the

files used above in testing the witness Wai Shoon were not in the record before the Secretary of Labor. On the contrary, the letter of transmission of the record on appeal (R. pp. 62-63) noted as inclosures the identical files, among others, above noted, which *were* before the Secretary; and doubtless if appellant's Praecipe for Transcript (R. p. 90) had requested the same, these items would be before this Court, as they were before the Court below.

4. A scrutiny of the testimony given by the second witness, Wong Wah Heen, strongly tends to indicate a concerted fabrication in this case.

His testimony was strangely similar to that of Wai Shoon. He also had lived in Hawaii since *1894;* he also knew an infant son of one Mui Ow Gut who died *"about 30 years ago"* in Honolulu at the age of *"30 odd or 40 years"* (R. p. 50). He also did not know when the father's remains were shipped to China. And strangely, he also did not know of the departure of the widow and her child until he went to China in 1932. Note how he put the dates (R. p. 51):

> "Q. When did she go back to China?
> A. At the age of 35 years, I don't know the year."

Would he reasonably have known the intimate fact of a woman's age, whose absence passes unnoticed for 26 years, and be unable to state the actual year? *Did he use this figure of "35" because the manifest record so shows, and he knew or had been informed that it did so show?* But continuing, he also met the appli-

cant for "about ten minutes", also in the morning at about ten o'clock (R. p. 52). He improved on his forerunner in one respect: he claimed he recognized or knew the mother by the fact of her residence in the village, and that he went to call on her. But there was necessarily the same failure to identify this claimant as the person whom he may have known as an infant in Honolulu before 1906. This similarity of facts suggested an efficient device in the economy of memory, though somewhat lacking in ingenuity. It may be here a contrivance devised to defeat any serious "discrepancies". But does it do honor to the perspicacity of the Board, or of this Court to whom the claimant now appeals?

III.

SUMMARY OF THE FACTS.

1. The salient points of this record are four: (1) The claimant himself could offer no valid corroboration of his claim of Hawaiian birth; and did not offer any proof, directly or otherwise, of his identity. (2) The witness Lee Wai Shoon did not supply these deficiencies; he did not know after the lapse of 27 years either the mother or the son. His information was hearsay (there is no deceased declarant in this case) as to the claimant's *identity, his departure, and his birth.* (3) The witness Wong Wah Heen was similarly unable to identify this claimant as an infant known to him before 1906 in Honolulu, and of whose

departure he had no information until he visited China in 1932. (4) Lastly, the appellant did not produce the affiant Mui Gum Yet, who was avowedly, in view of his sworn statement which was in evidence, a possible material witness; though engaged in nothing more urgent than planting pineapples, and in the relatively restricted boundary of a small island, he "cannot be found".

2. This is the state of the "evidence". Appellant disregards it, perhaps naturally, and argues from a summary headed "Case informally discussed by the Board" (R. p. 57) that the executive action can be attributed only to "unfounded suspicion". He appeals to the generous language of the Supreme Court in the decision of *Kwock Jan Fat v. White*, 253 U. S. 454, of which it must be noted in all candor, that those sentiments as a rule of guidance in these cases are *dicta* except in reference to a situation, comparable to that which the Supreme Court therein ruled on, where a Board of Special Inquiry commits so manifest an abuse of discretion and denial of due process as to fail to make of record all the testimony which it considered. That the succeeding decisions of that Court have made this plain is too well known to require citations.

3. Appellant, for the first time, here complains of three alleged improprieties not noted by him in his petition for the writ nor in his brief before the trial court, namely: (1) That the Board Chairman, although with expressed reservation, referred to two other cases of a nature similar to the applicant's

within the current week. (2) That the Board Chairman drew an improper inference from the witnesses' disclosed inability to recall major facts testified to in other cases. (3) That the Board regarded with disfavor the fact that these witnesses each disclaimed having met any former resident of Hawaii in a signed statement to an Immigrant Inspector on their recent return from China.

It would seem plain from the record before the Board that it did not, and could not, regard these points as decisive of the instant claim. The motion to exclude plainly states (R. p. 58): "From the evidence presented I am not convinced that the present applicant Mui Sam Hun was born in this country". The Board *acted* on *inadequacy;* it noted the above as *important,* but not *controlling.* The Board of Review did not depart from this view (R. p. 21, next to last paragraph); nor did the trial court (R. p. 78, last paragraph).

At best appellant's contention suggests only that the Board was wrong in considering these points, and not that such regard was a manifest abuse of discretion. The issue made is: With what importance or emphasis could the executive Board fairly regard the considerations noted? Of the executive's latitude in this respect, when its action is challenged in the courts, it is submitted that the Supreme Court has, over a considerable period, spoken clearly:

> "* * * we cannot assent to the proposition that an officer or tribunal, invested with the jurisdiction of a matter, loses that jurisdiction by not

giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

Lee Lung v. Patterson (1902), 186 U. S. 168, 176.

"* * * We do not discuss the evidence; * * *.

"The denial of a fair hearing is not established by proving merely that the decision was wrong. (Here it is argued the *method* of arriving at the decision was wrong) Chin Yow v. U. S., 208 U. S. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or *in drawing a wrong inference from the evidence.* * * * Under the circumstances (of an otherwise fair hearing) mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law." (Italics and parenthetical matter supplied.)

U. S. ex rel. Tisi v. Tod, 1924, 264 U. S. 131, 133, 134.

IV.

APPLICATION OF THE LAW TO THE INSTANT FACTS.

1. The validity of the present exclusion order does not rest upon a successful showing that the record adduced by this claimant and his witnesses contains within itself the seeds of its own destruction. It was not necessary that the Board should have succeeded in developing intrinsic proof of the invalidity of this

claim out of the mouths of its proponents. In fact, this is not to be expected, nor is it required, for the Board had no duty *to disprove* the claim advanced nor to impeach the witnesses. This Court, long since, observed in this connection:

> "* * * The means of showing this (native birth) are presumably in his own control. It would be extremely inconvenient, and probably in most instances, impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule of evidence which devolves the burden (of proof) on the party who presumably has the best means of proving the fact; * * *" (Parenthetical matter supplied.)
>
> *U. S. v. Chun Hoy,* 1901, 111 Fed. 899, 902.

Since the evidence, then, in these cases, may be entirely that of the applicant, no basis is afforded for the rule, propounded by appellant (Brief, p. 16), that "he need make out his case by no more than a fair preponderance of the evidence". This argument assumes an adversary proceeding, with evidence for, and against, which does not exist.

2. It follows that it *is* a question, in these cases, of the adequacy and sufficiency of a claimant's proof, not of its "preponderance". Nor can the appellant validily dissent to the view of the court below that the claimant's proof before the Board was required to be "clear and convincing" before judicial intervention was authorized. This is, in one instance, the lan-

guage of a Circuit Court, and, it is ventured, the general purport of the unexpected weight of authority:

> "* * * The only question before us is whether the evidence in support of the father's citizenship was so clear and convincing that the refusal to accept it was arbitrary and unfair."
>
> *Flynn ex rel. Lum Hand v. Tillinghast,* (1st C. C. A. 1932), 62 F. (2d), 308, 309.

The Board therefore, it is submitted, had a duty to accord this applicant a fair hearing, and to afford him every opportunity to present his proof. It was then its duty, without bias or prejudice, or preconceptions, to weigh that evidence, not by any comparative balance of pro and con (as none existed), but by a reasonable appraisal of its adequacy, its probative value, and its sufficiency to support a determination by a responsible fact-finding body. The record made here by the appellant before the Board, it is believed, left the issue of his Hawaiian birth and his true identity plainly in doubt. The Court may feel this understates the character of this record; but it is enough. If so, the disposition of this controversy is indicated by the oft-repeated rulings of this Court, as stated in *Chin Share Nging v. Nagle,* 27 F. (2d), 848, 849, and recently noted in *Haff v. Der Yam Min,* 1934, 68 F. (2d), 626, 627:

> * * * "if there is a possibility of disagreement among reasonable men as to the probative effect of the discrepancies or contradictions in the testimony of the witnesses, the finding of the ad-

ministrative board will not be disturbed. Chin Wing v. Nagle (C. C. A. 9) 55 F. (2d), 609, 611.

"The conclusions of administrative officers upon issues of fact are invulnerable in the courts unless it can be said that they could not reasonably have been reached by a fair minded man, and hence are arbitrary."

Respectfully submitted,

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

WILLSON C. MOORE,
Assistant United States Attorney,
District of Hawaii.

ERNEST J. HOVER,
U. S. Department of Labor,
Immigration and Naturalization
Service, Honolulu, T. H.

H. H. MCPIKE,
United States Attorney,
San Francisco,

Attorneys for Appellee.

Due service and receipt of a copy of the foregoing Brief is hereby admitted this 27 day of March, 1935.

E. J. BOTTS,

Attorney for Appellant.

No. 7759

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

ROBERT CHESTER O'BRIEN,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—3-2-36

No. 7759

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ROBERT CHESTER O'BRIEN,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco. 60—3-2-35

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In the Southern Division of the United States District Court, for the Northern District of California.

No. 19239-L

ROBERT CHESTER O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT—WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That plaintiff is a citizen of the United States and a resident of the Northern District and State of California, and of the City and County of San Francisco therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924 and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 23rd day of August, 1918, plaintiff entered the armed forces of the defendant; that he served the defendant as a Lieutenant in its Navy from the said August 1918, to on or about

February 7, 1920, when he was honorably discharged from said service and that during all of said time he was employed in active service of defendant.

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of $10,000 by the defendant, who thereafter [1*] issued to plaintiff its certificate No. T-3,876,524 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy until March 31, 1925.

V.

That on or about March 31, 1925, and while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as traumatic arthritis and synovitis resulting the loss of right leg, heart trouble, kidney trouble, nerve trouble and other disabilities shown by the records and files of the U. S. Veterans' Administration.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

VI.

That said diseases, injuries and disabilities have continuously since March 31, 1925, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since March 31, 1925, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

VII.

That plaintiff on March 17, 1931, made application to the defendant, through its Veterans Bureau and the Director [2] thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on April 26, 1932, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same.

VIII.

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-seven and 50/100 Dollars ($57.50) for each and every month transpiring since March 31, 1925, and continuously thereafter so long

as he lives and continues to be permanently and totally disabled.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

WHEREFORE plaintiff prays judgment as follows:

First: That plaintiff since March 31, 1925, has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from the said March 31, 1925, and continuously so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney [3] a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided

by Section 500 of the World War Veterans Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK,
Attorney for Plaintiff.

United States of America,
District and State of California,
City and County of San Francisco—ss:

ROBERT C. O'BRIEN, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action.

That he has heard read the foregoing complaint and knows the contents thereof.

That the same is true of his own knowledge and belief except as to those matters stated upon information and belief and that as to those matters he believes them to be true.

ROBERT C. O'BRIEN.

Subscribed and sworn to before me this 16th day of May, 1932.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 16, 1932. Walter B. Maling, Clerk. [4]

[Title of Court and Cause.]

AMENDED COMPLAINT.
WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That plaintiff is a citizen of the United States and a resident of the Northern District and State of California, and of the City and County of San Francisco therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924 and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 23rd day of August, 1918, plaintiff entered the armed forces of the defendant; that he served the defendant as a Lieutenant in its Navy from the said August 23, 1918, to on or about February 20, 1920, when he was honorably discharged from said service and that during all of said time he was employed in active service of defendant.

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of $10,000 by the defendant, who thereafter issued to plaintiff [5] its

certificate No. T 3,876,524 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy until March 31, 1925.

V.

That on or about March 31, 1925, and while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as traumatic arthritis and synovitis resulting in the loss of use of right leg, heart trouble, kidney trouble, nerve trouble and other disabilities as shown by the records and files of the U. S. Veterans' Administration.

VI.

That said diseases, injuries and disabilities have continuously since March 31, 1925, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since March 31, 1925, and still now is, permanently and totally disabled by

reason of, and as a direct and proximate result of such disabilities above set forth.

VII.

That plaintiff on March 17, 1931, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on April 26, 1932, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same. [6]

VIII.

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-seven and 50/100 Dollars ($57.50) for each and every month transpiring since March 31, 1925, and continuously thereafter so long as he lives and continues to be permanently and totally disabled.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments

until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

As and for a second and separate cause of action, plaintiff alleges:

I.

Plaintiff adopts and reincorporates in this, his second cause of action, paragraphs I, II, III, IV, V, VII and IX of his first cause of action and makes them a part hereof, the same as if expressly set out in full herein.

II.

That at the time plaintiff ceased to pay said premiums due on said insurance, he was suffering from a compensable disability, to-wit, traumatic arthritis and synovitis, of ten per centum (10%) or more degree of disability, resulting directly from injury and disease contracted in line of duty while in active service of the defendant: that in pursuance of the provisions of the War Risk Insurance Act and the World War Veterans' Act of June 7, 1924 as amended, [7] plaintiff was given various compensation ratings by the defendant's Bureau of War Risk Insurance, and also its Veterans' Bureau, namely of a compensable degree of disability of ten per centum (10%) or more from February 7, 1920, to the present time all of which ratings are for a compensable degree of disability. That although entitled to compensation from the defendant's Veterans' Bureau, on account of said ratings

made by it, plaintiff drew no compensation from the defendant's Veterans' Bureau for any disability prior to August 4, 1930.

That by reason of non-payment of premiums claimed to be due on his said insurance as aforesaid, the defendant claims that said insurance lapsed on April 1, 1925. That at all times from and after the 1st day of April, 1925, up to and including July 2, 1927, through the application of compensation to which he was entitled under his disability ratings as aforesaid and section 302 of the War Risk Insurance Act as amended December 24, 1919, and which was then uncollected, plaintiff's said insurance was revivable and revived in the sum of Ten Thousand ($10,000.00) Dollars as directed by said statutes, including section 305 of the World War Veterans' Act of June 7, 1924 as amended, and became payable to him in monthly installments of Fifty Seven and 50/100 Dollars ($57.50) per month as of and from the date of the beginning of his permanent and total disability and during the time he continues to be so totally and permanently disabled and in case of his death after the beginning of his permanent and total disability, thereafter to his beneficiary until the total of two hundred forty (240) installments of said insurance have been paid, less the unpaid premiums and interest thereon at five per centum (5%) per annum, compounded annually, in installments as provided by law. [8]

III.

That ever since the said 1st day of April, 1925, and at all times since that date, there has been due

to plaintiff said sum of Fifty Seven and 50/100 Dollars ($57.50) for each and every month transpiring since said date, less unpaid premiums and interest thereon at five per centum (5%) per annum, compounded annually in installments as provided by law, and that there will be due in the future like monthly installments in a like amount so long as plaintiff remains permanently and totally disabled. That the defendant has wrongfully and unlawfully refused to pay the plaintiff any of said monthly installments of Fifty Seven and 50/100 Dollars ($57.50) per month due plaintiff since April 1, 1925.

WHEREFORE plaintiff prays judgment as follows:

First: That plaintiff since March 31, 1925 has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from the said March 31, 1925 and continuously so long as he lives and remains permanently and totally disabled.

Third: That plaintiff have judgment against the defendant for all of the monthly installments of said insurance in the amount of $57.50 per month for each and every month beginning with the date upon which he is found to be permanently and totally disabled, to-wit: at any time between April 1, 1925 and July 2, 1927, during all of which time he had uncollected compensation due him from the United States Veterans' Bureau sufficient to have paid all

premiums due on said insurance less the unpaid premiums and interest thereon at five per centum (5%) per annum compounded annually in installments as provided by law and continuously thereafter so long as plaintiff remains permanently and totally [9] disabled.

Fourth: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance recovered in this action, payable in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK,
Attorney for Plaintiff. [10]

United States of America,
Northern District and State of California,
City and County of San Francisco—ss.

ROBERT C. O'BRIEN, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action.

That he has heard read the foregoing amended complaint and knows the contents thereof.

That the same is true of his own knowledge and belief except as to those matters stated upon information and belief and that as to those matters he believes them to be true.

ROBERT C. O'BRIEN.

Subscribed and sworn to before me this 12th day of August, 1932.

HENRIETTA HARPER,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 12, 1932. Walter B. Maling, Clerk. By B. E. O'Hara, Deputy Clerk. [11]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

The United States of America for answer to the amended complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

Dated: September 16, 1932.

GEO. J. HATFIELD,

United States Attorney.

[Endorsed]: Service of the within answer by copy admitted this 17 day of September, 1932.

ALVIN GERLACK,

Attorney for ....

[Endorsed]: Filed Sept. 17, 1932. [12]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,239-L

ROBERT CHESTER O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

THIS CAUSE came on regularly to be tried on the 13th day of September, 1933, and was thereafter regularly continued to the 14th then the 15th, then the 16th day of September, 1933, Alvin Gerlack, Esq. appearing as counsel for the plaintiff, and H. H. McPike, Esq., United States Attorney, and Thos. C. Lynch, Esq., Assistant United States Attorney for the Northern District of California, appearing as counsel for the defendant: a jury of twelve persons was regularly impaneled and sworn to try said cause: witnesses on the part of plaintiff were sworn and examined, and documentary evidence on behalf of the parties hereto, was introduced, and after hearing the evidence, the arguments of counsel and the instructions of the Court the jury retired to consider of their verdict, whereupon the jury returned into court their verdict in words and figures as follows to-wit:

"(Title of Court and Cause.)

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, Robert Chester O'Brien, on the second cause of action, and fix the date of his permanent and total disability from following continuously any substantially gainful occupation beginning June 30, 1927.

September 16, 1933.

STANLEY P. DOYLE,
Foreman." [13]

And the Court having fixed plaintiff's attorney's fees in the amount of ten per centum (10%) of the amount of insurance recovered in this action:

IT IS ORDERED, ADJUDGED and DECREED that plaintiff Robert Chester O'Brien, do have and recover of the United States of America the defendant, seventy-five (75) accrued monthly installments of insurance at the rate of Fifty-seven and 50/100 Dollars ($57.50) per month beginning June 30, 1927, up to and including the monthly installment due August 30, 1933, less the unpaid premiums due on June 30, 1927 on plaintiff's said policy, as shown by the records and files of the defendant's Veterans Administration, and also less interest on said unpaid premiums at five per centum (5%) per annum compounded annually in installments as provided by law.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant the United States of America deduct ten per centum (10%) of the amount of insurance recovered in this action, and pay the same to Alvin Gerlack of San Francisco, California, plaintiff's attorney for his services rendered before this Court, payable at the rate of one tenth (1/10) of all back payments and one-tenth of all future payments which may hereafter become due on account of said insurance, said amounts to be paid by the United States Veterans Administration to said Alvin Gerlack or his heirs out of any payments to be made to Robert Chester O'Brien or his beneficiary or estate in the event of his death before two hundred and forty (240) of said monthly installments have been paid.

Judgment entered: September 16, 1933.

WALTER B. MALING,
Clerk.

Approved as to form:

THOS. C. LYNCH,
Assistant United States Attorney. [14]

[Title of Court and Cause.]

AMENDED ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 13th day of September, 1933, the above-entitled cause came on for trial; Mr. Alvin Gerlack, attorney, appearing

for the plaintiff, and Messrs. H. H. McPike, United States Attorney for the Northern District of California, and Thomas C. Lynch, Assistant United States Attorney for said district, appearing for defendant; a jury was impaneled and sworn and thereupon the following proceedings took place:

STIPULATION.

It was stipulated that plaintiff was a resident of San Francisco, California; that the action was brought under the World War Veterans Act and that plaintiff entered the Naval Service of the United States and served from August 23, 1918, to February 20, 1920; that plaintiff carried $10,000, insurance and that he paid premiums to March 1925 and the 31 day grace period expired May 1, 1925; that there was a disagreement under Section 19 of the World War Veterans Act.

Mr. GERLACK: Concerning the second cause of action, it is stipulated as I understand it, that he had a compensable degree of disability of 10% or more from February 20, 1920, or [15] rather when he was released from active duty in February 1920 up until the present time and that on April 1st, 1925, he was suffering from this compensable degree of disability and at that time he had uncollected pension due him: that he also was suffering from a compensable degree of disability of 10% or more, as found by the Veteran's Bureau on July 2, 1927, and on that date July 2, 1927, he had uncollected compensation or pension due him in an

amount more than sufficient to have paid all of the back premiums on his insurance from April 1st, 1925, up to and including July 2, 1927.

Mr. LYNCH: I think it won't be necessary that he had back compensation sufficient to pay his premiums.

Mr. GERLACK: And that if the jury should find that he was permanently and totally disabled on or prior to July 2, 1927, it is admitted that the other two requirements of Section 305 were complied with, namely compensable degree of disability and payment of premiums.

Mr. LYNCH: Yes.

TESTIMONY OF ROBERT CHESTER O'BRIEN.

Robert Chester O'Brien, the plaintiff, called in his own behalf, being first duly sworn, testified as follows:

"I am the plaintiff in this action. While serving in the Navy as a Lieutenant during the World War, I was blown up in a mine explosion. I was on a collier called "Lake Pleasant". We were a collier but also mine sweeping. I am just a little nervous. I will have to go a little slow. We had kites out from either side of the vessel, cutting the mines. This particular time we cut a German mine and it fouled the kite. I was executive officer of the ship and we were in the habit of hauling the peravain in and then letting it go with a run and see if it would clear the mine from the kite. In this particular

(Testimony of Robert Chester O'Brien.)
instance it blew up in the kite; it [16] blew me upward perhaps 10 to 15 feet from the kite reel."

Mr. LYNCH: "In order to save time, we are willing to stipulate that Mr. O'Brien actually received an injury during the war."

Mr. O'BRIEN: "I was blown in the shell and the reel was maybe 5 to 10 inches from the deck and my leg went between the deck and the reel and cut me across under the knee here. It did not amount to much at that time; I didn't even know the government knew anything about it until I resigned; I was treated aboard ship by the Pharmacist Mate for a week or ten days; there was no doctor on the ship. The Pharmacist Mate was the Chief Petty Officer, an ordinary Chief Petty Officer according to his rating, but as a rule, in this particular instance I think he was Pharmacist Mate First Class, an enlisted man. That was the only medical personnel on the collier. He treated my leg for about a week or ten days and I got well enough so I could get around. We were short of crew,—well we were not short of crew, but had a very inexperienced crew. I had to turn to again. I guess it was about maybe one month later we went into Bassens, France. I went ashore; I was using a cane—I had not recovered from the mine explosion when I went through the dock at Bassens, France. I was walking with the help of a cane at the time. Of course during the war there were no lights on the dock. There was one of the planks out. I went between and I just happened to catch the place that I had injured the

(Testimony of Robert Chester O'Brien.)
knee, directly the same place. Well I was carried aboard ship. We went into Brest and a Naval Officer came aboard there, one of the Medical Corps. He ordered me transferred to the hospital as soon as we got into Cardiff (Wales). I was in the hospital there perhaps one month. I was treated for lacerated leg, but at that time it would not heal up—sort of a pusy condition—it—I don't know how to describe it. It was the same knee that bothers me now. I was in Cardiff—well I was actually hospitalized perhaps a month or [17] more, maybe six weeks, but I was altogether there about three months in all. I was on a cane and they gave me light duty on the examining board. Well I apparently got better. I asked to be put back in active duty and they asked for volunteers for the North Sea and I volunteered to go up there. I did not notice that there was anything wrong with my leg then, until I got up there. Well, it was very bad weather in the North Sea and I noticed then occasionally at night the knee would lock on me. I could't move it at all. That was approximately perhaps July of 1919. Well the weather up there at that time,—well of course the weather in the North Sea was always bad, with practically no calm seas.

The first assignment I got up there, of duty—I had had experience in the army with small craft; I took a tug over to France for the army and they made me pilot of the mine sweepers, taking them in alongside of the collier to fuel. Then afterwards—

(Testimony of Robert Chester O'Brien.)
perhaps in about two months I guess, they put me in command of the "Millard". Well the duty there was—well we planted 56,000 mines up there and we had to sweep them up, so I was in charge of mine sweeping. I was engaged in that duty until it was finished around December, 1919. My leg bothered me during all of that time. The principal bother of it then, it would lock on me. I couldn't—at night—well when I would try to get out of bed, I would find I could neither bend it one way or the other. The only way I could manage was to manipulate it and keep working it, and it then would sort of snap and come into place. I had no doctor aboard at the time. Then it started to pus a little bit, but there was—well I was pretty proud of the command I had and I never did report the leg then until—well I was suffering all of the time I was up there and expecting to come home when the mine fields were finished, but instead of that I got an order to tow a broken down sub-chaser then from Stefangon, Norway, to New York, and I got her back and got up [18] to Portsmouth, New Hampshire, and simply broke down. I went to the doctor there and he asked me where I lived and I told him. They ordered me back to California. I got up to Mare Island and they asked me if I would go as Executive Officer of the collier, then the "Celtic". That was the first ship I had been aboard that had a doctor. Well the moment he noticed I was lame and nervous he told me he would have to look me over. He looked me over

(Testimony of Robert Chester O'Brien.)
and told me to go to the Hospital. He sent me to the Mare Island Hospital. I first noticed that I was nervous—I have been nervous since the war more or less, but my nerves—I haven't lost complete control of my nerves—I kept losing confidence in myself all of the time from 1920. Along about 1925 when I was examined for my insurance I was a nervous wreck. I was in the Mare Island Hospital off and on I would say for about two months.

While in the hospital I was treated for my right leg the same leg that was injured in the mine explosion. I was discharged from active service on February 7th, I think it was, 1920. And then I served two enlistments, two four year periods I believe; 1923 was the end of the second four years, I think it was. But I was actually discharged from service in February, 1920.

The witness then identified a photostatic copy of his orders placing him on inactive duty. This was introduced and received in evidence as Plaintiff's Exhibit 1 and read to the jury.

(Testimony of Robert Chester O'Brien.)

This document, PLAINTIFF'S EXHIBIT 1, read as follows:

"Navy Department, Bureau of Navigation,
Washington, D. C.
February 7, 1920.

From: Bureau of Navigation,
To: Lieutenant Robert Chester O'Brien, USNRF-3
Naval Hospital, Mare Island, Cal. (Commandant, Twelfth Naval District.)

Subject: HONORABLY DISCHARGED FROM ACTIVE SERVICE. [19]

1. Upon your discharge from treatment at the Naval Hospital, Mare Island, Cal., you will proceed to your home and upon arrival will regard yourself honorably discharged from active service in the Navy.
2. Immediately upon your arrival home, report your local address in full and date of arrival to the Bureau.
3. The Bureau takes this opportunity to thank you for the faithful and patriotic services you have rendered to your country in the World War.

(Name illegible)
REAR ADMIRAL, U. S. Navy."

Attached to and made a part of Plaintiff's Exhibit 1, there is a citation reading as follows:

"THE SECRETARY OF THE NAVY,
Washington, 11 November 1920.

SIR: The President of the United States takes pleasure in presenting the NAVY CROSS TO

(Testimony of Robert Chester O'Brien.)

LIEUTENANT ROBERT C. O'BRIEN, U. S. N. R. F. for services during the World War as set forth in the following:

CITATION: "For distinguished service in the line of his profession as commander of the U. S. S. MALLARD, a mine sweeper engaged in the difficult and hazardous duty of sweeping for and removing the mines of the North Sea Mine Barage."

For the President, Josephus Daniels,
Secretary of the Navy."

Plaintiff, the witness, continuing: I actually arrived home and was actually out of the service five days later I presume, after the date of that last order. Between the date of my discharge in 1920 and April 1, 1925 I tried to follow the only thing I knew what to do—go to sea. While following the sea I was Master Mariner, in other words, Captain of various ships. During these years it was just a struggle up to the time I completely collapsed in 1930—I couldn't even try it any more.

The circumstances under which my insurance lapsed for non-payment of premium due April 1, 1925, were as follows: naturally I never paid any premiums at all. I left Mrs. O'Brien an allotment from the owners, and out of that she took care of the insurance. So this particular trip she joined me in San Pedro and we went to the Islands, then up to Vancouver, then down to San Francisco. After my insurance lapsed I tried to reinstate it.

(Testimony of Robert Chester O'Brien.)

I received communications from the Veterans Bureau. They refunded the premiums [20] that I had paid in the interim. (There was then received in evidence PLAINTIFF'S EXHIBIT NO. 2 consisting of three letters). Mrs. O'Brien remitted these premiums. (The reason for the refund was given as follows in one of the letters: Insurance lapsed April 1, 1925. Application for reinstatement rejected on account of physical condition of applicant.)

Prior to 1925—I think it was about three months after I was discharged from the Navy, I took a command called "Nishnaha". I made two trips to Australia. Those were six months' trips. My leg got so bad then I had to ask for a lay-off. Well I came back to California here and consulted Dr. Carpenter. He is dead now. He told me I was crazy to go to sea. I went back to New York and tried it again on the ship called "Easterner" of the same company. I could not walk. That was due to my right knee. My right knee was stiff, so painful I could not walk on it without a cane. I could not sail the ship on account of my physical condition and resigned. That was the middle of 1923. At that time my leg felt—well it was pusing a little bit. Well it was simply painful to walk on it, and I couldn't sleep at night with it. All I can say is, like any other crippled condition, I was suffering with my leg all of the time. My leg bothered me at night, it would lock on me. The joint would

(Testimony of Robert Chester O'Brien.)
lock when I would be asleep and I would wake up like one in a cramp. I could not take a step on the leg. I could not step on my leg on account of the pain. If I rested my weight on it it would not hold me because it was in a bent condition. I couldn't straighten it out. It would lock in that position. I first noticed the locking when I was in service on the "Mallard", I mean the locking. So far as the locking is concerned, I have experienced the same trouble from then on up to the present. It locks on an average of two or three weeks and perhaps takes a half or three quarters of an hour. So far as my sleep being disturbed, the pain [21] in my knee would keep me awake. I experience that same condition all of the time at present. At the present time at night I very seldom ever sleep more than two hours at a time, but it is not entirely due to my knee. I also get short of breath. I have had that trouble I think since perhaps 1925—I could not say exactly what month. I had this shortness of breath badly when my insurance was cancelled. That was the middle of 1925. I noticed the shortness of breath about the middle of 1925. On April 1, 1925, I was running on the "Santa Cruz" for the Grace Line Co. I was master of the "Santa Cruz" I think about ten or eleven months. She carried 30 passengers but otherwise was a freight vessel. She was engaged in the West Coast of South America trade, she was running from Vancouver as far south as Southern

(Testimony of Robert Chester O'Brien.)

Chile, Sinafo, Valparaiso, with a trip occasionally to the Islands. Due to the fact during the bad, foggy weather the particular times a man should be on the bridge I was unable to get on the bridge on account of my knee being in the condition that I couldn't walk, the Chief Officer performed my duties on the bridge at that time. The Chief Officer is the First Mate. The Master picked the Mates on the ship. I had the selection of those myself. It is usual for the Chief Officer or First Mate to carry Master's papers according to the type of vessel, not necessarily on that type of vessel such as the "Santa Cruz". During foggy weather, and entering and leaving port, it was my duty to actually be on the bridge navigating the ship during the time I was Master of the "Santa Cruz". During bad and foggy weather it was very seldom I could get on the bridge coming in and out of port, perhaps 50% of the time I had to leave it to the Mate. This was true during the period all of the time I was on the "Santa Cruz" about eleven months. This was true during all of that eleven months. The duties which devolved upon me for instance when the ship was [22] down in South America was going ashore and visiting the agents, visiting the Consul, presenting the papers to the Consul, namely, manifests, register, crew list. I never performed that duty personally. At that time my physical condition was such that I could not manage to get around or down the gangplank into the launch to go ashore, therefore I had to send the purser to do my business

(Testimony of Robert Chester O'Brien.)

ashore. That was true during all of that time I served as master of the various vessels on that run. I was engaged in that run from 1925 until 1927; I resigned. I was performing my duties unsatisfactorily. I was running for the Grace Line at that time. When I resigned I was on a ship called "Rotarian", formerly known as the "Condor". I went on the "Rotarian" in 1925—I think it was 1925. I was on her until 1927. I can't remember just what part of 1925 I did go on her. I think I resigned about July of 1927. After I resigned I went to the U. S. Marine Hospital at the Presidio of San Francisco, where I was treated for my right leg again. This condition of my leg was continuous during all of the time I was Captain of the "Rotarian". I am conscious all of the time of a pain in my leg, but in fact there has not been a second since my discharge that I am not conscious that the leg pains me. It is acute when I walk or try to do anything. I cannot straighten it—it will not straighten. I can move it some but I cannot straighten it completely out and that is the condition that existed right straight along while I was employed as master of these vessels and as a result I had to do my work entirely by direction of another man. I was nervous in 1920. My nervousness has been a progressive trouble. I cannot say I have always been as nervous as I am now. I have been continuously nervous since 1920. The way this nervous condition presents itself to me

(Testimony of Robert Chester O'Brien.)

and just how I feel under that nervous strain—the first time I knew it, was fear at sea, which I never had in my life until I was injured. Fear first, then lack [23] of confidence in myself. My mind won't—I can't concentrate. I can't think like I used to think. Then I want to cry for some unknown reason, which I don't know what I want to cry all the time for, but I just do. I do not know the name of whatever is wrong with me—myself, but I guess I must be irritable. The pain in my leg causes me to think of myself—to think of my leg. It is hard to think of anything else—this thinking of my leg—well it is the fear always of falling, for one thing. I have taken bad falls with it. It is just a constant—I am not able to explain. You just know you are in pain all of the time—that is all I know about it.

Plaintiff then offered photographs of plaintiff's knee which were received as PLAINTIFF'S EXHIBIT 3 for the purposes of illustration.

Since I have been discharged from the Navy, my knee has been apparently, practically the same way as it appears in those photographs (Plaintiff's Exhibit 3) except perhaps not quite so swollen. When I was discharged it may possibly not have been swollen such as it is now, that is, the inflammation is probably not as great there. It was swollen as bad in 1927 as these photographs show. I was not operated on for my leg in 1927. The operation was suggested but I was simply too cowardly and

(Testimony of Robert Chester O'Brien.)
nervous and wouldn't stand it. I would not let them operate.

I applied for a position with the United States Government. I tried—I made application for Civil Service examination, with the result that they sent it back to me for a physical examination. I was not given a physical examination, they would not examine me. I applied for a Civil Service position. I was sent for physical examination to the Veterans Bureau. They refused to examine me. I went there personally at the instance of the instructions of the Civil Service Commission. I wrote them a letter [24] and asked them if there was ever a change in the ruling where I could get work without being physically examined, to let me know.

Plaintiff then offered and there was received in evidence PLAINTIFF'S EXHIBITS 4 AND 5 which was the A. G. O. report from the Secretary of the Navy. This record certified by the Secretary of the Navy, was taken out of the government file at the time of the trial, and contains the transcript of medical treatments while plaintiff was in the Navy.

I never had any trouble before such as I have described here, prior to the time I went into the Navy. I never had any nervous trouble. I never had any difficulty in sleeping before this explosion. The pain, nervous condition, and about my leg—they were not in existence before I entered the service of United States. I never had any trouble following

(Testimony of Robert Chester O'Brien.)
my occupation as a seafaring man prior to the war—prior to these disabilities.

Cross Examination.

It is a fact that I injured this knee in 1912 before I went into the service. I also injured it in 1916 prior to my injury in service. I think I took command of the SS "Santa Cruz" on February 19, 1934. The position I held on the boat at that time, I took command, I was the Mariner, I mean the Captain of the boat. The "Santa Cruz" is approximately 394 feet 2 inches long and 52 feet 3 inches wide. I stayed on the "Santa Cruz" I think about one year, during all of that time I was Master. At that time the boat was engaged in the West Coast of South America trade. We carried passengers. We had accommodations for about 25, but as a rule we had maybe 5 or 6. She was a combination passenger and freight boat. A boat of that type is not better to command than an ordinary freighter. I would not prefer it. It is a matter of opinion as to whether it is considered a better boat by most captains if they are on a freight boat, to be transferred or promoted to a combin- [25] ation boat of this type, as a step to getting a passenger boat. I personally would not want a passenger ship at any time. Regarding the duties of the Master of a vessel of that type of the "Santa Cruz", well—a Master first of all is responsible for the safety of the vessel, the safety of the crew, the safety of the passengers, the efficiency of the crew, the efficiency

(Testimony of Robert Chester O'Brien.)
of his ship, the safe navigation of his ship, the upkeep of his ship—and generally the handling of all of the ship's business. The Master—there is no one on the ship that is not responsible to the Master and the Master is the only one responsible for everything on the ship. In other words, responsibility is the principal duty. Had there been any complaint as to improper care being taken for the safety of the passengers or of the crew, or had I been derelict in my duty as to any of these things, had there been any complaint—there is no one to complain to but the Master. The conduct of the ship was not carried on properly, the stowage was bad, I was continually criticised for bad stowage because I could not personally see to it myself. I selected my own Mates. The Mate theoretically perhaps, ordinarily attends to the stowage, but the Master is responsible for the stowage. In that trade, the chief officer was usually the one who took No. 1 and 2 Hold, and the Second Officer 4 and 5 or 3 to 5. The cargo is stowed by stevedores, but it was done under the supervision of the Mates. They were responsible to me to see that it was done. A good ship master would go down there, would go down into the hold to supervise the stowage of the cargo. In going into a harbor, the Quartermaster takes the wheel. The Captain is right there, he brings the vessel in. He is right by the side of the Quartermaster. He orders the movements and direction of the vessel, unless there is a pilot aboard, then he simply ad-

(Testimony of Robert Chester O'Brien.)

vises the Master. That is done by all Captains—is a customary act. I could not do that, in going into any port—not into any [26] port. I would say that on the West Coast I would perhaps average two out of five ports. I would not be able to do it, but the other three ports I could do it. I could do it in three ports and not in the other two because it would depend entirely on the weather. If foggy at the time, I would be laid up in the bunk and could not get out. In other words I find foggy weather an incitement to my difficulty, but if the weather were fair and the conditions favorable, the tendency was to relieve me of a great deal of pain. Well, it is like this cane, on a sunny day I can go along without it, on a sunny, hot day. During the winter I can't manage at all—or in foggy weather. I could bring the ship into two out of the five ports myself and be actually present on the bridge. I simply said that approximately, as a matter of fact the ship was safely brought into all of those ports during all the time I was on the "Santa Cruz" approximately one year. I was responsible for bringing in the ship. Very often I would give directions for bringing in the ship. I used to holler down to the bridge and tell the Mate how the light bore or if passed such a point, perhaps I would tell him to keep off 2 or 3 miles until around such and such point. I wouldn't actually take the wheel and steer the boat myself, but that is practically the same advice I would have given if I were there in person. As

(Testimony of Robert Chester O'Brien.)
a matter of fact I cannot, and it is not often done, delegate that power or duty to the Purser or officer in charge of the cargo of the ship, to take the cargo list, health bills, manifest and things of that nature, ashore. The Purser makes up those papers. After the papers are signed they are in the Master's custody. After the Purser brings the papers to the Captain—the ship—the formality of entering and leaving port is called "Entrance and Clearance" and can only be done by the Master. The Master should go ashore with those papers himself in person. As to [27] whether it was required that he does go, or whether he should go or not. I can only say that a Master—it would be impossible for a Master to leave San Francisco unless he went in person to the Custom House. It evidently wasn't required that I go ashore in all ports with those papers, because I could not do it. I would simply write a little note to the ship's agent that I was feeling very bad, and ask him if he would mind coming out; instead of asking the purser to go ashore. There was objection on the part of the port officials to that method of procedure—as a matter of fact the papers were always accepted and my ship was cleared. I was on the "Santa Cruz" approximately one year when I was transferred. My wages I think were $275.00 including board and lodging. During all of that time my wages were $275.00 for approximately one year. I left the "Santa Cruz". I did not leave of my own accord—I was transferred. I was trans-

(Testimony of Robert Chester O'Brien.)
ferred to a freight vessel. I was on the SS "Cacique" to bring her North, then I was transferred to the ship I stayed on. I was on the "Cacique" perhaps six weeks. I was put on that ship to bring it North. I was transferred from the "Santa Cruz" to the "Cacique" to bring the ship to San Francisco. I brought the ship to San Francisco in good condition. I was transferred directly from the "Santa Cruz" to the "Cacique". That was in December of 1924. I then went to the "Rotarian". I went to the "Rotarian" perhaps—well as soon as I got to San Francisco; I came in in the morning and left in the afternoon. I was on the "Rotarian" until I resigned in 1927. I was on the "Rotarian" continuously from approximately—I cannot tell you. If I was on the "Rotarian" continuously from April 1925 until 1927 — it refreshes my memory when it is stated that I resigned on June 12th 1927 —then for two years and four months I was on the "Rotarian" continuously employed—if those other dates are the dates—I think those dates are correct. [28] The "Rotarian" is a freight vessel also known as the "Condor" engaged in the same trade, went into the same ports and performed the same duties. I think my salary on the "Rotarian" was the same, not more. I would say it was $275.00 and found. I was paid that every month for two years—whenever that time is—two years and four months—all of the time I was in command of this vessel, barring just one instance—I remember of—I think it was

(Testimony of Robert Chester O'Brien.)
2 or 3 weeks when I was so bad I had to sign the log over. Got nervous and told the Mate to take it over. We logged it to that extent; he would be responsible for the couple or three weeks. I was on the vessel in bed and could not get out at all for a period of 2 or 3 weeks out of those 2 years and four months—that I was laid up. I was laid up for a period of 2 or 3 weeks of this particular period of 2 years and four months I was on the "Rotarian". I stayed on the vessel during the time —I was too bad at that time to give directions or anything. After I left the SS "Rotarian" in June of 1927, I went to the Marine Hospital. I have been Master of other vessels since I was Captain of the "Rotarian". I went—I was off for about a year I guess, then I tried once more—the "Silver Spruce" of the Kerr Line. I believe I got $250.00 there; I am not sure of that, it may have been more. It would not have been $300.00; I know I started with $250.00 and I think they did increase it to $275.00; that included my "found" as is the expression. I was on the "Silver Spruce" approximately 2 years going out to the Far East, as far as Calcutta, India.

There was then introduced in evidence the records of the Marine Hospital, which under stipulation of counsel of both sides were received by the Clerk marked Plaintiff's Exhibit 1 for indentification.

I was on the "Silver Spruce" for approximately 2 years. [29] On those trips to the Far East it was

(Testimony of Robert Chester O'Brien.)

necessary that the ship be cleared at all ports and the proper manifests, crew lists, cargo lists, etc. be made out and signed by the Captain. They were as a matter of fact made out and signed by the Captain. On that particular ship I acted as my own purser, that was the only difference. The papers were properly signed and delivered. I delivered the papers myself on that ship for two years. I started at $250.00 per month salary and I think it was increased to $275.00—that might have been $275.00 to $300.00. I think that was the standard pay at that time on that trade—whatever the Standard Master pay in that trade was, I was getting. I testified that on the "Santa Cruz" I got approximately $250.00 per month. Well I will stand corrected, if you have the record there. I was either getting $275.00 on this—if it is of any importance at all—I think it was $250.00 and $25.00 uniform allowance, making a total of $275.00. I am not sure if I was getting $300.00 per month while on the "Santa Cruz". My total pay might have been $300.00—$275.00 and $25.00 uniform allowance. When I went on these boats which I have testified to—when I first went on them I did not start with a certain salary and have that salary increased. My salary was raised on one boat from $250.00 to $275.00. That is automatically done by the change in the scale of wages. In going to sea there is a certain definite scale of wages, whatever that scale is, you receive; an able seaman possibly would get $35.00 on one trip and

(Testimony of Robert Chester O'Brien.)
if there were a new agreement he might get $45.00 on the next trip, and vice versa, he might get $45.00 and reduced to $35.00. During the period commencing in February 1924 and ending in 1930, I tried out a trip to see whether I could manage it as second mate on a ship called the "West Cactus" to Cuba and back to San Francisco. I tried it out to see if I could manage to go to sea again. I went with a friend of mine. That was during the year I laid off, between 1927 and 1928. I was [30] on that boat from September 24, 1927 to December 8, 1927—4 months. I left that boat because I was let out on December 8, 1927. I sought re-employment at that time. I was employed as Master of the "Silver Spruce" on January 31, 1928. It was a different vessel, different companies, one had no connection with the other. From the period commencing February 2, 1924 down to February 26, 1930 I was not continuously employed. During that period of approximately 6 years from 1924 down to 1930 I was practically off almost a year between the "Silver Spruce" and the "Rotarian". During my trips to South America I went to the hospital in Callao, Antofagasta. I cannot remember the date I went to the hospital at Antofagasta. I could not tell you approximately. I think I was on the "Rotarian" at that time. I could not say whether I went to the hospital shortly after I joined the "Rotarian" or the next trip. It was within the first two trips. This trip usually took about four months for the round

(Testimony of Robert Chester O'Brien.)

trip counting from the Sound back to the Sound. I was in the hospital in Antofagasta sometime between February 11, 1925 and October 11, 1925. I cannot even approximate whether I was in the hospital around March or April or around in September or October. I was in the hospital at Antofagasta about two weeks I think. I went to the hospital in Calleo; I went up there for physic-therapy treatments, delaying us for about one week in port; that was while I was on the "Rotarian" also. I cannot tell you approximately when that was. I had medical treatments in so many ports that practically every doctor that came aboard the vessel would do something for me. I think the hospitalization in Callao was after the hospitalization in Antofagasta. In Antofagasta I received treatment—just rest for a nerve breakdown and knee; laid in bed. There were doctors in these hospitals. I had medical attention in both places. All of the mates on the vessels of which I was Master carried Master's certificates themselves. It is not necessarily a custom of the sea [31] that a man who holds one position, holds a ticket for a higher position, but usually. For instance the second mate usually has first mate's papers or a master's ticket; during the war that was not the case, that is the merchant vessel; on account of the shortage of the licensed officers. For instance on a ship of the class of the Leviathan or any of those vessels, they are all masters, even the fifth, sixth officers; usually on the passenger vessels all of the watch officers are licensed masters. On the boats of

(Testimony of Robert Chester O'Brien.)
which I was Captain I was usually certain to get a Master's mate always. In the clearing of a ship the Master always signed a statement to the effect that the crew or the ship is properly manned, properly stowed, and all parts seaworthy and ready for the voyage to be performed. When clearing from San Francisco, the Bill of Health, as it is known, is simply an affidavit from the Public Health Officer that at the time the vessel departed, that there is no contagious disease in the port that you leave. There is no affidavit made out by the Captain as to the health of his officers and men except as I explained. You simply make that blank, it is not an affidavit, you simply sign a form. Naturally if any man on the ship becomes disabled, you report him; there is no other one to report him. If any one of the men on the ship was disabled and was unable to carry on his duties, the Captain would be the only one to make the report; that does not include the Captain because the Captain is not one of the crew; nobody reports for the Master. The Captain does not have to report his condition to any one; let me explain that a man goes to sea—apprentice seaman, ordinary seaman, able bodied seaman, boatswain, 4th mate, 5th mate, mate, master, at that time it was assumed that he is mentally and physically able to be master of the vessel. There is never any examination attached to it. I remember appearing before the Board of Appeals in February 1932 be- [32] fore the Veterans Bureau back in

(Testimony of Robert Chester O'Brien.)

Washington, D. C. I remember Mr. Hall, Liaison Representative of the American Red Cross was with me as my representative. My testimony was given under oath at that hearing. At that time I was asked to tell my story. At that hearing in response to the invitation to tell my story, I stated that the holding of a Master's ticket was 90% of the qualifications for being a Master Mariner. I would say that today. I don't remember if I said that the physical requirements of the job were practically nothing, but I would say it. If I were asked the question, I would say it now. The holding of a Master's ticket—that the physical qualities are much less than the requirement of holding a Master's certificate. If you have a ticket, you are not required to do much physical labor—that is the only examination physically that a Master takes after he has Master's papers, is his sight—for color blindness. Aside from that there is no more physical examination. Being a Master Mariner is the easiest job in the world under certain conditions. I do not know of any easier job.

Counsel for the Government then read into evidence parts of a letter purporting to have been written by the plaintiff to Hon. Hiram W. Johnson, which letter was quoted in a letter from Senator Hiram W. Johnson to the defendant's Veterans Bureau. Parts of this letter read as follows:

> "I have always considered that this government insurance was an ample bonus for what

(Testimony of Robert Chester O'Brien.)

services I had rendered my country, and inasmuch as I have followed, without a day's illness, the same vocation and work in the Merchant Marine for which the Navy found me fitted to serve in time of war, that the cancellation of this policy in the face of the thorough explanations given the Veterans Bureau was unnecessary and unjust, and I cannot believe that a country founded on patriotism would snatch away its reward on a mere technicality."

The said letter is dated June 7, 1926 and the same further reads:

"I am at present at sea and as I am away from the United [33] States nine months of the year and am forced to take this means of asking your direct help. Shortly after the United States entered the war I offered my services as a navigator to the United States Navy. I was physically examined and found fit and was made a Lieutenant, Jr. Grade in the Reserve Force. I was later promoted to a Lieutenant and given command of the U. S. S. 'Mallard', and engaged in mine sweeping in the North Sea, and on my return was decorated with the United States Navy Cross for Distinguished Services. At the time I was commissioned I took advantage of my Government's insurance offer to the extent of $10,000.00 and carried this insurance up to about one year ago, when, owing to the fact that my wife, the beneficiary of my policy,

(Testimony of Robert Chester O'Brien.)

and myself, were at sea, the monthly premium inadvertently was four or five days late arriving at Washington. As I understand the rules of the Veterans Bureau, this lapse could have been regulated without another physical examination within a period of three months, but as I had gone to South America it was impossible for me to accomplish the form required in time. However, this was fully explained to the Bureau, who insisted that rules could not be broken and that another physical examination was necessary. I took this examination in Tacoma last January, the first opportunity I had, and have been notified that my insurance has been cancelled owing to the fact that the physical examination disclosed a rapid heart, which the examining doctor noted as being probably caused by nervousness, and a slight trace of albumen in the urine."

The witness continued:

Well I could really say the same thing today. I have never been ill with any disease of any kind since I have been discharged from the Navy and what I meant in that letter and which I will say now, I have never been sick or ill of any disease or any trouble, excepting the trouble that I was discharged from the Navy with. I have never been down with sickness. Naturally it would be understood by the jury and everyone else that I was mak-

(Testimony of Robert Chester O'Brien.)
ing a desperate effort to save my insurance; but I did not lie; there is nothing in that letter that is not true.

The witness was then shown a letter dated Jan. 21, 1926 written on the stationery of the Grace Line SS "Rotarian", Tacoma, Washington.

That is my signature—I wrote that letter.

The letter read as follows:

"Veterans Bureau, Insurance Division,
Washington, D. C. [34]

Attention: Charles E. Mulhern:

Dear Sir:

Enclosed herewith report of Medical Examination for reinstatement of my insurance. Dr. Turner finds my heart rapid and accounts for it by nervousness. I have been in Puget Sound several days loading for South America and have lost considerable sleep in moving the ship from port to port, and I am positive that my heart action is normal under ordinary conditions, as I have never experienced any symptoms that would lead me to believe otherwise. I also was a little nervous in passing the examination as the loss of this insurance would be a great blow to me. I am leaving for South America in a day or two to return about mid-April and would like insurance changed to a straight life in the same amount. Naturally I will be unable to make application on regular

(Testimony of Robert Chester O'Brien.)

form and/or any other papers requiring my signature until my return, so, if possible, would like to authorize my wife's signature on the application form. My wife's address for the next three months will be 105-19 134th St., Richmond Hill, L. I., N. Y., to which address please send the findings of the enclosed application. I do not know just how much is due in premiums but am enclosing two months premiums on Term Insurance, and Mrs. O'Brien will make up any deficiency or payment necessary.

Respectfully,

R. C. O'BRIEN."

This letter was then received in evidence as DEFENDANT'S EXHIBIT No. 1.

The witness was then shown another letter written on the stationery of the Grace Line, SS "Rotarian" at Paita, Peru, dated October 23, 1925.

This is my signature—I wrote that letter.

The letter was addressed to Mr. Charles E. Mulhern, Assistant Director, United States Veterans Bureau.

The witness then proceeded: Just one place I should have said I was in the same condition as I was when I was discharged from the Navy, which I repeatedly told.

The letter read as follows:

"My dear Sir:

My wife, with unselfish carelessness, has allowed my insurance to lapse, and after much

(Testimony of Robert Chester O'Brien.)

forwarding the enclosed form #742 has reached me here in Peru. I have just returned from ashore hoping to have found an American doctor in the oil fields, but without success, I find myself unable to have the form completely [35] filled out and am writing you trusting that an exception can be made in my case and my insurance placed in good standing as soon as possible. Callao, Lima and Valpariso are the only ports on the West Coast where an American doctor is available and as I am making none of these ports this voyage, I am naturally much disturbed over my wife being unprotected by my insurance pending my return to the United States the early part of next year. My vessel carries no doctor, in which case as Master I am also the ship's doctor and as evidence of my health I can only certify on honor that since September 1919 I have been actively engaged without a break as Master of vessels in foreign trade, and as far as I know, am in good health as at the time of my being commissioned in the Navy. During the war I was in command of the USS "Mallard" a North Sea mine sweeper and was decorated with the Navy Cross for distinguished service. I have never applied for, nor expect, any other bonus than this insurance and would keenly appreciate it if the lapse could be considered as of one month, the subsequent lapses being due to the fact of being out

(Testimony of Robert Chester O'Brien.)

of reach in a foreign country. If this application is favorably acted upon please notify my wife, otherwise please notify me in care of my company as per letterhead.

Respectfully,

R. C. O'BRIEN,

Master, SS Rotarian."

This letter was then introduced in evidence as DEFENDANT'S EXHIBIT No. 2.

The witness was then shown and he identified his signature on a paper entitled "Application for Reinstatement of yearly renewable term insurance." This was signed at Paits, Peru, October 22, 1925.

The witness proceeded: That is my signature, I actually made out that application.

This application was then introduced as DEFENDANT'S EXHIBIT No. 3 and read to the jury by counsel for the defendant.

The witness was then shown another application for reinstatement of insurance dated Feb. 8, 1926. Counsel for plaintiff objected to any part of the application except the part which was signed by the plaintiff, which objection the Court sustained. The Court then received in evidence the first page and the other side of the first page of the application, which parts of the application were received in evidence and the rest of the application was not [36] received in evidence. The part so introduced in evidence was identified and marked DEFENDANT'S EXHIBIT No. 4. The parts of the above

(Testimony of Robert Chester O'Brien.)
application received in evidence were then read to the jury by counsel for the defendant.

The witness then continued:

I have no idea where that was mailed from, or where I mailed that unless it is marked. I cannot say whether it was mailed approximately within a week or so of the date it was received in the Veterans Bureau; that is all according to where I was at the time. If I was in South America, naturally it would not be within a week; if in the United States, it would be. I do not know if this application was made out after the one just read (defendant's Exhibit 3). My present employment—the American Legion is giving me work up in the Veterans Building—Club Room up there. I just assist in the Club Room as best I can. There is two of us there. I am relieving a friend of mine who is the manager. He goes out of the room a great deal. I help to tend bar, sell cigarettes. I am usually sitting down at the time and then I am very happy to have the job, believe me. There is not any salary attached to the job. The commission varies, one month I did make a hundred dollars; another month I made sixty. This month I think it is eight something. I should say last month it was eighty something. I have had that work for the last five months.

The court then received in evidence without objection PLAINTIFF'S EXHIBIT NO. 9 showing the disability ratings given the plaintiff by the defendant's Veterans Bureau, which letter was intro-

(Testimony of Robert Chester O'Brien.)
duced in evidence for the sole purpose of proving that plaintiff had a compensable rating under Section 305 of the World War Veterans Act under plaintiff's second cause of action.

Regarding my income, this little work the American Legion [37] is giving me up in the Club, that is all. One month it was one hundred dollars.

Redirect Examination.

I was never given a physical examination in connection with any application that I made to be Master of any ship. When I stated that being a Master is an easy job, I mean it with qualifications. I believe a well man at sea in command of a passenger vessel has about as easy and pleasant a life as I know of, I did not consider that I was sick at the present time; I am not sick now. I am disabled but I haven't sickness. By that I mean, I am referring to contagious disease or an illness. The government were well aware of any trouble at the present time. I distinguish between illness and injury, that is what I mean, that I never had any illness, I was still plugging away at my job; that is the only thing I wrote them or intended to write them. On this form which counsel showed me which has been introduced me defendant's Exhibit No. 4, which is made out in typing, I possibly made it out myself, maybe the purser made it out. If I have signed it, whatever I have signed is perfectly all right, since the answers don't mean anything but what I would answer today. This present job which I have—this

(Testimony of Robert Chester O'Brien.)
position—of taking care of the club room for the American Legion—it does not cause me any great pain to do this work because I am sitting down and am more comfortable than I would be at home. Having a little occupation is good for me. I enjoy it. As a matter of fact the job is a charitable job. If I wasn't disabled I would not have it.

Regarding the circumstances of my leaving the Grace Line, the Grace Line told me they would give me one more trip. If I didn't improve I would have to quit.

Q. Improved in what way?

A. Nervous, irritability. I wasn't getting ashore to see [38] the agents; the agents had written lack of cooperation. They put it to me that I would either have to do my job, or get off the ship. I asked them to let me have one more trip and I tried it. When I got back they told me I was finished—I would resign. It was an understood thing if I didn't improve I would have to resign. I do not know that the company's agents in South America complained to the company about me; the only thing I know that from the talk I had with the General Manager that some one must have complained that I had not cooperated on the West Coast of South America.

As regards pain after the operation Dr. Linde performed, as far as my condition was manifested in my feelings, directly after the operation I felt better for perhaps 5 or 6 months. There was not

(Testimony of Robert Chester O'Brien.)

any pain there because there was not any feeling. My leg was perfectly numb but as the numbness wore away, the pain came back. I have got very little feeling between there and here now (indicating). At that time my ankle—the whole leg was so I couldn't feel anything. All I knew was that I was weak. Concerning the way I feel now compared to the way I felt prior to July 7, 1927, all my disability is something you can't define, when it started or when it stopped. It has been a constantly growing thing since the day I was discharged from the Navy. I can't say definitely on such a date it was this or that. Taking the spring of 1927 and regarding whether I am worse now, or better now, or about the same as in the spring of 1927—in the spring of 1927 I was still trying to work, so I couldn't be as bad as it is now. I have lost all hold of myself. I couldn't try to work. At that time I had enough nerve to tackle it. Regarding my leg condition now compared to then, my leg if I could explain—I was able at that time to throw the cane away and make myself walk; I could almost hide my limp, in fact I had to on many occasions, I can't do it any more now. It was necessary for me to have had the Mates perform my duties for me. Regarding what would happen if the Mates had not performed my duties [39] for me—if those mates to whom I delegated my duties which I said I would have performed—would not have performed them, would I have been able, even suffering pain, to have done them—well if

(Testimony of Robert Chester O'Brien.).
you will bear with me just a moment your Honor, I would like to explain that question—yesterday I was asked what the main duties of a Ship Master was: I would say the greatest duty of a Ship Master is to be prepared for an emergency, such as a collision or fire or accident at sea, of some kind. I was never prepared for that emergency. I just would have to hope that it would never happen. The navigating of a vessel between here and Honolulu for instance—it would not make any difference if the Master left the ship, after the pilot left the ship, the ship would go to Honolulu; in other words, the first mate could take the ship to Honolulu.

The COURT: The question is not relative to that; the question is would you have been able, not if some one else was able?

A. No. I could not have gone out and done those duties which I picked some one else to do in my place. I would not have asked them had I been able to. Regarding the practice at sea, for instance a man is sick, he receives wages while on the voyage just the same. A man can go on a six months' voyage, get sick at sea and never turn to.

Recross Examination.

I just testified that I could not carry on with the Grace Line any more. After I left the Grace Line I laid off a year and then tackled the "Silver Spruce". After I left the Grace Line was not the end of my sea-going experience—I made one more effort. After I left the Grace Line I made four trips of six months each.

TESTIMONY OF JOSE FERRERIA, FOR PLAINTIFF. [40]

Jose Ferreria, called as a witness in behalf of the plaintiff, being first duly sworn, testified on

Direct Examination:

I am General Foreman for the Schirmer Stevedore Co. and have known Captain O'Brien since he was on the "Silver Spruce". I used to meet the Captain every time his ship came in and I saw him limp from the first time I met him. On some trips he would be laying in bed and he couldn't get up because his leg was all swollen. The Captain could not accompany me down into the hold to see if the cargo was stowed properly. I would go myself and he would ask me if things were okeh. In every other case I have seen the Captain come down and view the stowage. Most of the time Captain O'Brien couldn't get down in the hold to view the stowage on the "Silver Spruce". He was supposed to go down every time but I will say he went down maybe once or twice. I should judge the ship was in about every four months for a period of two years and that out of six times he went down about twice. The other times he would look from the deck as far as he could.

Cross Examination.

My impression was that the Captain brought the "Silver Spruce" in about eight or nine times. I know that on some ships it is customary for the first mate to superintend the stowage of cargo along with the stevedore boss.

TESTIMONY OF ALFRED O. ARSENEAU FOR PLAINTIFF.

Alfred O. Arseneau, called as a witness in behalf of the plaintiff, being first duly sworn, testified:

I am Manager of the Foreign and Domestic Trade Department of the Oakland Chamber of Commerce and have known Captain O'Brien since February, 1924. I was Purser of the "Santa Cruz" when Captain O'Brien took command of it, and served under him approximately [41] eleven months. During that time I noticed that he was lame and moved about the vessel with some difficulty. I have not noticed any great change in his limping since that time. He might limp a little more now than he did when I first met him. I have observed him sick in his bed aboard ship probably four or five times. During the time that I was on the "Santa Cruz" I had to look after the Clearance and Entrance papers, go to the Consul, to the Agents, and look after the cargo; things that had formerly been done by the previous captains I had sailed with. Captain O'Brien never performed these duties while I was on the ship. Only on rare occasions have I done these things for other captains under whom I have served.

Cross Examination.

I was used as a check on the Chief Officer for the stowage of cargo. The Captain asked me to do that because he wasn't able to do it. The making up of the manifests, crew lists, health bills, is the duty of the Purser's Department. They are actually made out by the freight clerk and it is the duty of

(Testimony of Alfred O. Arseneau.)
the captain to see that they are presented to the Consul and the papers should be signed at the Consulate. Captain O'Brien never signed these papers at the Consulate. I would bring the papers back to have the Captain sign them and in some cases the Consul would bring the register aboard to have it signed. The formalities of entering and leaving port were completed upon the captain doing this. I never heard of any objection on the part of the port officials to that procedure.

Mr. LYNCH: Q. In other words, although you were used to a certain method of carrying on your ship's business as Purser, it was possible to deviate from that as long as the papers were properly signed, is that correct?

A. Yes, sir.

Q. The captain is responsible for everything that goes [42] on on a ship and it is in his power to delegate any of his duties to you? In other words he can say to you "Now, Mr. Arseneau, you take these ashore and have them signed"; and that thereupon becomes your duty?

A. That is true subject to orders from the Company. I had certain duties I had to perform on board of the vessel that I wasn't able to perform because of the necessity of going ashore for the Captain.

Q. But as a matter of fact, once you get out to sea, the captain is absolute master of the vessel?

A. Yes, sir.

(Testimony of Alfred O. Arseneau.)

In foreign ports a form must be filled out or signed by the master of the vessel wherein he certifies that all his officers and crew are in good health and able properly to carry out their duties. This form was signed by the Captain in all cases.

Mr. GERLACK. No further questions. If Your Honor, please, we offer in evidence at this time various physical examinations that have been made of Mr. O'Brien which Mr. Blake has handed me from the Veterans Bureau file. Mr. Lynch, it is stipulated that these are the various physical examinations made of Captain O'Brien at various Government Hospitals by the Veterans Bureau and were taken from the official file.

Mr. LYNCH: Yes.

The COURT: They may be received as Plaintiff's Exhibit No. 6 in evidence.

Redirect Examination.

About a month after Captain O'Brien had been on board I noticed he was very nervous and irritable and he got worse as time went on. He used to get me out of bed at all hours of the night. [43] I would go up to his room and find him in bed and he would appear to be in pain. I would sit down there and talk to him for a while until he would go to sleep. Sometimes I would call the Chief Steward to give him medical treatment. I have seen the Steward give him medicine. The Captain would sometimes rub his leg when I was in the room with

(Testimony of Alfred O. Arseneau.)

him. The "Santa Cruz" did not carry a physician and any medical service required was performed by the Chief Steward. During the eleven months that I was on the "Santa Cruz" with Captain O'Brien he would call me up to his room anywhere from three to five times a week. In January or February of 1925 we were on the "Cacique" and the Captain didn't have a meal down in the saloon as well as I can remember on the whole trip coming back to San Francisco. He became so irritable and so hard to get along with that when he asked myself and the rest of the officers to accompany him to the other vessel I found a reason for not going and got him to send a radio to San Francisco to relieve me from being transferred with him. I believe the Captain is more nervous than he was then.

Recross Examination.

I don't recall that at any time when I was with Captain O'Brien he sought hospital treatment in any South American port. I don't recall that the Captain ever asked me to secure a doctor for him at any port. There is no regulation saying the Captain must have his meals in the dining saloon but I know he preferred to eat with us rather than eat alone by himself. I went up several times to eat with him and I know he didn't do it by choice, but by necessity, being unable to go down to the dining room.

(Treasury Decision #20 offered in evidence and received as "PLAINTIFF'S EXHIBIT #7").

TESTIMONY OF DR. FREDERICK G. LINDE FOR THE PLAINTIFF. [44]

Dr. Frederick G. Linde called on behalf of the plaintiff, after being sworn, testified as follows:

Direct Examination.

I am a physician and surgeon practicing in this city. I graduated from the University of California in 1916 and have specialized in orthopedic surgery. At the present time I am on the teaching staff of the University of California and visiting orthopedic surgeon at the San Francisco Hospital and also on the consultant staff of the Shrine Hospital. I served in the Medical Department of the Navy during the World War. I am the recipient of the Navy Cross.

I examined Captain O'Brien in April of 1930, at which time he came to me for consultation and advice in reference to his right leg and knee joint. I found upon examination a badly diseased knee joint and that the lining of the joint was partly destroyed. The motion of the knee joint was definitely limited. There was obvious deformity of the joint consisting of a rather marked swelling, old scars, evidencing previous injury of the knee. The X-ray examination showed rather marked destruction of the cartilage of the joint, with numerous loose sections of pieces of bone in the cartilaginous lining in the joint. There was considerable overgrowth of the normal contoure of the bones. The examination showed a distinct grating of the joint to palpitation, sensitiveness to touch and extreme of motion elicited rather marked pain and there

(Testimony of Dr. Frederick G. Linde.)

was a sensation on motion of the joint as though the joint was creaking, ratchety, catching, at certain locations. I advised an operation on this joint to remove, as far as possible, these obstructions, and to endeavor to get a painless knee. This operation was performed in May, 1930, at which time the joint was exposed and found to be badly diseased in that the whole lining of the joint was studded with [45] cartilaginous bodies; the pouch above the knee, which is normally filled with lubricating fluid, I might say was obliterated; there were several loose pieces of cartilage of bone within the joint, and one particularly large in the lining below the patella or knee-cap, which was removed. The entire lining of the joint was removed together with these obvious loose bodies of cartilage. This is done in this type of case so that after the operation a new lining will grow in part, and is done to eliminate the element of locking and consequent pain. The Captain made a fair post operative recovery and I saw him subsequently three or four months thereafter. He had some improvement to the extent that his pain was lessened but he still had rather marked limitation of motion and his pain wasn't entirely eliminated. The photographs which have been introduced as "Plaintiff's Exhibit #3" are good photographs of this condition.

At the time I observed and treated Captain O'Brien in 1930 I certainly believe he was permanently and totally disabled within the purview of

(Testimony of Dr. Frederick G. Linde.)
the definition which has been introduced as "Plaintiff's Exhibit #7". I do not believe he can follow any vocation to make a livelihood. I base this answer on the knee condition and his mental and nervous condition. Captain O'Brien was suffering considerable pain at the time I examined him and this was to a large extent relieved by the operation. There was undoubtedly damage done to the nerves of the knee.

(Records of the Marine Hospital offered and admitted as "PLAINTIFF'S EXHIBIT #8").

At the time I examined Captain O'Brien in 1930 it is my opinion that his condition was of many years standing.

(Counsel for plaintiff then read to witness from "Plaintiff's Exhibit #8", Records of the Marine Hospital in San Francisco). [46]

Dr. Linde testified that the X-ray conclusions as shown in that report showed the same condition that he had described—the knee joint badly diseased, with many loose pieces of bone and cartilage within the joint with the destruction of the articular or gliding part of the cartilage).

Dr. Linde continuing:

In my opinion the condition that I first saw in 1930 was of many years standing. It very well could date from the injury he received while in the Service. You could trace it back easily to that period. Osteomyelitis is infection of the bone itself.—

(Testimony of Dr. Frederick G. Linde.)

of any bone. It is notoriously incurable, in that we say in a more or less facetious manner—once an osteomyelitis case, always an osteomyelitis case. I have seen it come back as soon as 27 days after the original operation. I did not find an osteomyelitis condition because I didn't explore the bone and I am not able to tell from the photographs if such a condition was present.

(Plaintiff's counsel read from "Exhibit 5"—Abstract of the Navy Report furnished by the Secretary of the Navy).

Q. What is "cellulitis", Doctor?

A. Infection of the tissues overlying the bone, the soft tissues under the skin.

Q. What is the meaning of "fascia", Doctor?

A. Fascia is the muscle tissues; it is the covering of the muscles.

Q. What are "tendons"?

A. Tendons are the ends of the muscles which are attached to the bones.

Q. What is the meaning of "atrophy", Doctor?

A. Atrophy means shrinkage of the tissues of the muscles from previous injury or disuse. [47]

Q. What does "crepitus" mean, Doctor?

A. Crepitus is the grating sensation I described, on palpitation.

(Testimony of Dr. Frederick G. Linde.)

The statement in that examination "there is apparently a backward displacement of head of tibia with loose cartilage" means that the upper end of the leg bone had slipped behind, or slightly behind the lower end of the thigh bone, a partial dislocation. I do not agree with the opinion of this record that the present condition was caused by the 1916 explosion. It is difficult to say if it was caused by the mine explosion in 1919. In that report the physician noted on enlistment R. 18/20, L 18/20, and 20/20 is perfect vision. If at the time of O'Brien's enlistment the "physical defects noted at enlistment" were merely noted to be about his eyesight and tonsils slightly enlarged, it would indicate to me no trouble was noted on his leg. They were pretty rigid on enrollment.

Referring to the medical report made at the United States Naval Hospital, Mare Island, California, September 2, 1930, the term psychasthenia used in that report means some nervous trouble. Arterial hypertension refers to high blood pressure and myocardial insufficiency is a weakness of the heart muscle. That particular examination was made after I had operated on Captain O'Brien.

Referring to the neuropsychiatric examination made by Dr. J. M. Wheate at the San Francisco Regional Office of the Veterans Bureau on August 16, 1930, the term "tachycardia" means a rapid heart. I believe that the type of infection which I found in O'Brien's knee at the time of my examina-

(Testimony of Dr. Frederick G. Linde.)

tion could be a contributory cause of his present heart trouble.

It is possible. In other words the poison from the infected knee gets into the system and poisons the heart through that channel.

Referring to the examination dated August 5, 1930 by Dr. [48] E. E. Hobby, the conclusion in that examination "the patella is ankylosed, the knee can be extended only to 130 degrees" means that the patella is immovable. The fact that an osteomyelitis is apparently quiescent, as it was in 1930, does not mean that it is cured. There is always a probability of it recurring.

The gluteal region as mentioned in the report dated December 19, 1932, refers to the buttocks. Emphysema refers to a condition of the lungs where the air cells are slightly enlarged from coughing, and where it states there is an area of anesthesia in relation to the scar below the right knee, that represents section of cutaneous nerve supply", it is meant that there is a numb area in the knee which has followed the cutting of some of the nerves in the skin.

I have heard all of the medical reports read and they are in the main consistent with my finding as made in 1930, and if those reports are correct, I don't think I would vary the testimony which I have already given as to the total and permanent disability of the plaintiff. I could not trace the disability back any particular number of years but

(Testimony of Dr. Frederick G. Linde.)
I know it has been of long standing, and believing as I do the history that he received an injury during the period of the War in the way it has been indicated by the records, I think the injury can be very properly traced back to that time.

Cross Examination

I examined Mr. O'Brien in April of 1930. I took a history at that time. I haven't the history with me but I recall that some time in 1911, '12 or '13, I have forgotten just which, he had a fracture of the leg, the right leg below the knee, that it had drained for some time, healed, then had become a useful member, but on two occasions he had, during the war, subsequently injured that leg. Following that time he sustained some disability. Four [49] years before I saw him and the leg had begun to stiffen up materially and two years later he was hospitalized. With increasing disability throughout this time he finally could not perform any of the duties at sea and he wanted help. At that time I had a consultation with my associates, Dr. Bowl and Dr. Pruett, and we decided it would be a good chance of giving Captain O'Brien a painless knee or minimize the pain by an operation such as I have described. That operation was performed in May, 1930. At the time of the operation I examined his heart and lungs and found no condition which would lead me to fear that giving him an anaesthetic would perhaps be fatal. I have never seen a knee that was as badly diseased by this particular condition as was

(Testimony of Dr. Frederick G. Linde.)

Captain O'Brien's. The operation that I performed temporarily improved the knee. It is true that an operation could be performed on the knee whereby it would be ankylosed and the only lessening of function would be the fact that the man would have a stiff leg. There is no pain in an immovable joint. I believe it is possible this could be done to Captain O'Brien's knee at the present time. However I believe that the osteomyelitis which has been lying latent in the upper part of the bone just below the knee is very apt to be stirred up by the operation, which would likely lower the resistance of that bone; there is a possibility of there being a serious infection. It is also possible, but not probable, that the osteomyelitis may remain quiescent for the rest of his life.

Q. Do you understand the definition of permanent and total disability? With the permission of the Court, I would like to read the definition of permanent and total disability.

The COURT: Certainly, read it to him.

Mr. LYNCH: The definition goes this way: I will read the whole definition: "Any impairment of mind or body which renders [50] it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability. 'Total disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suf-

(Testimony of Dr. Frederick G. Linde.)

fering from it. Under that definition, was he permanently and totally disabled?

A. Very positively.

Q. Doctor, let me ask you this: If an operation such as we discussed a little while ago, that is, if the knee joint were ankylosed, wouldn't it be possible for the man to carry on numerous occupations in that condition?

A. Depending entirely upon the knee, yes.

Q. Do you know of people who are in that position and who are performing their daily tasks?

A. Yes.

Q. Doctor let me ask you this: In giving your opinion as to permanent and total disability, I would ask you if you are bearing in mind the fact that the definition does not mean to convey the fact that a man must carry on his former occupation?

A. I appreciate that.

Q. But any occupation: the definition doesn't specify any particular occupation, it says "any occupation".

A. Yes.

Q. But you do believe that a man with an ankylosed knee joint could properly carry on a number of occupations?

A. Yes, if that is his only disability.

Q. Doctor, now you have stated that it is possible that the knee joint can be ankylosed and the leg stiffened and much of the pain, as a matter of fact, all of the pain removed and the [51] man

(Testimony of Dr. Frederick G. Linde.)

could be able to carry on some occupation, is that correct?

A. As far as the knee goes, yes.

Q. That is the only thing we are concerned with?

A. Yes.

Q. Then bearing that in mind Doctor, how do you reconcile the fact that you consider the man permanently and totally disabled, when, as a matter of fact, you stated an operation could be performed on his knee which would enable him to carry on some sort of occupation?

A. His knee condition is not his whole picture with me. I mean there are other factors which enter into his disability which are not referable to the knee.

Q. Doctor, I'll ask you if that knee condition could be corrected by an operation of that sort?

The COURT: No, I think you don't understand the witness. In answering the questions of the Court, he said that he didn't base his total disability upon his knee alone, but upon the mental condition, and I think the Doctor is not quite answering you in a way so as to give you that view, as if you had asked the question to develop if that is so or not.

A. That is correct, Doctor?

Q. In other words, you feel that it is the combination of the knee trouble with the other, the mental psychiatric issue, which makes him totally disabled.

(Testimony of Dr. Frederick G. Linde.)

A. I think it is very obvious.

Q. Doctor, did you take that history into consideration when you gave as your opinion here that the man was permanently and totally disabled as far back as 1925?

A. Yes.

Q. Are you still of that same opinion? [52]

A. Yes.

Q. Doctor, confining your answer to the knee injury only and going by your examination, would you say that this man was permanently disabled and unable to follow any occupation as far back as 1925?

A. I should.

Q. That is based on our examination.

A. Yes.

Q. Of his knee?

A. Yes.

Q. Doctor in addition to the knee injury, what else did you say you found?

A. I found that it was obvious that Captain O'Brien was not particularly,—was not particularly in an equable state of mind. I mean he appeared to be nervous, which was quite obvious.

Q. Doctor in giving your answer as to permanent and total disability, are you basing that on the testimony that you heard here in Court and the facts that have been related?

A. No: on the examination of the patient and the condition I found his knee in at the time of the operation.

(Testimony of Dr. Frederick G. Linde.)

Q. Doctor, would you say that the man, who, by his own statement to you, did not begin to have this leg stiffen on him until 1926 or 1927, was permanently and totally disabled in 1925?

A. If that were the only complaint made with reference to the knee I shouldn't of course.

Q. Going on that presumption, he made a statement on his knee as far back as 1912, would you say he was permanently and totally disabled in 1912?

A. No, because he also stated to me that he had recovered sufficiently from that to resume his ordinary activities.

Q. Well, if it were shown to you, Doctor, that the man resumed his ordinary activities and continued at substantial salaries down [53] thru all of the years and up as far as 1930, all that time at his chosen calling, would you say that he was permanently and totally disabled back in 1925 when, as a matter of fact, he worked 5 or 6 years after that?

A. No: if it were shown to me that he continued to do all his duties, I should not consider him totally disabled.

Redirect Examination.

If it were shown to me that approximately fifty per cent of his duties were performed by his fellow employees, I should say that he was permanently and totally disabled and in my opinion it was extremely deleterious to Captain O'Brien's health for him to do any work because he had a badly diseased

(Testimony of Dr. Frederick G. Linde.)
knee and any motion of any weight bearing would certainly aggravate the condition of his knee and produce rather marked pain. If he worked, it was against competent medical advice and such work would certainly retard cure of his leg and possibly make it impossible of cure. It is undoubtedly true that the patient would be better off if his knee would be made rigid and stiff, but in this particular case I think it would be extremely hazardous to attempt such an operation on that knee because of the possibility of lighting up the osteomyelitis and endangering his life very definitely. An osteomyelitis infection poisons the whole system.

Recross Examination.

Mr. LYNCH. Q. Doctor, when you examined Mr. O'Brien did he have any osteomyelitis?

A. Not by clinical examination, but by X-ray examination you could readily ascertain that there had been osteomyelitis in the upper end of the tibia.

Q. Did you make that X-ray examination? [54]

A. Yes, I made an X-ray examination.

TESTIMONY OF ERNEST A. PETER.

Ernest A. Peter, called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a master mariner and served with Captain O'Brien on the "Silver Spruce" from about June, 1927 to October, 1928. I acted as first and second

(Testimony of Ernest A. Peter.)

mate but at the time had master's papers. During this period I noticed that Captain O'Brien had difficulty getting around. He was lame and limped and he wasn't on the bridge very frequently when he should have been there. He was very irritable and nervous and he couldn't sleep at nights. I had the twelve midnight *at* 4:00 A. M. watch and practically every night the Captain would ask me to come down to his room and I would find him awake and nervous. I took charge of the ship on one occasion in leaving Calcutta because the port authorities refused to give clearance unless I was in full command. I navigated it from Calcutta about two days and then the Captain took charge again. On one other occasion I took the ship from San Francisco to Los Angeles and San Pedro and upon arrival at San Pedro the Captain resumed command. While I was navigating the ship he was in his room in bed. I would say that during the time I was on the "Silver Spruce" the captain performed all of the services that a Captain should have performed, about one-half of the time, the other half of his duties were performed by members of the crew.

Cross Examination.

I held a master's certificate while I was on the "Silver Spruce". It is practically required that you have such papers in order to hold a mate's job. The Captain is the absolute master of the boat, and within reason he can order a man to do any-

(Testimony of Ernest A. Peter.)
thing he wants to, such as telling the first mate to superintend the stowage [55] of cargo or he can delegate the purser to take the papers ashore to be signed, and if the Captain decided that he wanted so, as first mate, to take the ship in or out of port, he is entitled to give those orders although it is his responsibility.

Q. Well then, in view of that, would you say that Captain O'Brien was acting entirely within his rights when he asked any of the other officers to do his work?

A. It is not a question of that. The Captain was ill. The Captain could delegate to me any particular duty on any occasion. It is customary on most ships to delegate the various duties, such as the stowage of cargo, navigation, etc., to the various officers on the boat and the Captain is in general supervision over the whole thing. The trip on which I assumed command going out of Calcutta was about November, 1927 and the occasion of my taking the ship from San Francisco to San Pedro was on my last trip in October of 1928.

Redirect Examination.

It is not usual for a Captain to delegate to one of his mates the authority to bring a ship into port. It is invariably brought out and in by the Captain with the assistance of the pilot.

Captain O'Brien took the ship in and out of port on all occasions while I was serving under him with the exception of that time in Calcutta and the other time from San Francisco to San Pedro.

TESTIMONY OF DR. E. E. HOBBY.

Dr. E. E. Hobby, called on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a physician and surgeon employed by the United States Veterans Bureau. At the present time I am on an administrative furlough. I have been present and heard all [56] the testimony and this examination report dated August 5, 1930, is my examination which I made in the regular course of my employment as physician and surgeon of the Veterans Bureau. I think I examined Captain O'Brien twice and it is my opinion that he was totally and permanently disabled, *with* the purview of the definition which has been read, when I examined him on August 5, 1930. Accepting as true the statements made by the plaintiff in this case and taking the observation which I made myself, it is my opinion that this condition has existed since April 1, 1925, and I feel that the condition is likely to continue.

Q. Then, summing it up, you are of the opinion, if these statements and this evidence is true, that he has been permanently and totally disabled ever since April 1st, 1925?

A. I think so.

Q. Do you believe that at that time it was reasonably probable that his disabilities would last throughout his lifetime?

A. You mean when I last examined him?

Q. No, from April 1st, 1925, if these facts are true?

A. Yes.

(Testimony of Dr. E. E. Hobby.)

The COURT: In other words whether it is a permanent disability?

A. Yes; in conjunction with what I have seen since then.

Cross Examination.

I examined Captain O'Brien in 1930 and also in 1933. The first time I examined him I did not take a history but relied on the records of former examinations. O'Brien complained to me of stiffness of his knee and a painful knee, especially painful on any manipulation.

Q. Were there any other complaints?

A. I don't know as he made any other complaints at that time to me. [57]

Q. Wasn't it customary to ask a man being examined if he had any other complaint?

A. I always ask him if he complains of anything else, but my special examination has to do with the orthopedic examination, and the surgical complaints,—usually those things are taken up by the other examiners: I didn't go into them. In 1933 he also complained of extreme nervousness. I think I observed this at the first examination but I made no note of it at that time. My diagnosis was made in conjunction with an X-ray examination and I found that he had a compound fracture of the right tibia and osteomyelitis, the osteomyelitis having been healed and the fracture united, with adherent scar; he also had ankylosis, which was partial, right knee, following his operation for chronic synovitis and arthritis, secondary to the fracture and osteo-

(Testimony of Dr. E. E. Hobby.)
myelitis of the tibia. I don't know of any cases which are supposed to be as severe as this one, in which men are going about doing their daily business, actually earning a living. His knee in the present condition is one of the most painful of knees that we have. If made stiff by an operation, he would probably be relieved of his pain but he would have a stiff knee. This doesn't always happen but I expect that such an operation would relieve it. There are lots of people who are going about in the condition such as we have just described, namely, with a stiff knee, and these people have adapted themselves to earning a living.

The COURT: Q. Do you feel he is permanently and totally disabled, taking the knee condition alone, into consideration?

A. No, I don't think the knee condition alone; but I think the knee condtion together with his age and the fact that he has always followed the profession of a seaman, renders him permanently and totally disabled for his profession or any other [58] thing that he might take up at his age.

Q. The only element you are taking into consideration, Doctor Hobby, is the fact of his knee condition: That is the only thing that you are weighing for the purpose of making the statement that he is permanently and totally disabled?

A. I am weighing that especially, but I am also weighing the fact that the last examination that I made and the times that I have seen him since he has exhibited very marked nervous disturbance.

(Testimony of Dr. E. E. Hobby.)

The COURT: I see. Q. Let me ask you this question: If his knee condition was cleared up, as far as the pain goes: in other words, there is a suggestion here that the knee could be fixed in such a way that it would be immovable, the pain would cease down there,—the irritating conditions would cease: if that were relieved and that pain which you feel he endures now whenever he attempts to walk and possibly when he is sitting,—if that were taken away, would his mental condition clear up?

A. I don't believe his mental condition is entirely due to the knee.

Q. You think the knee is simply something that aggravates it?

A. It agravates it, yes.

Mr. LYNCH: Q. But you do believe, Doctor, that the ankylosing of this knee, as it is called, would, in some manner, lessen the mental disorder if there is any?

A. It might.

Q. Let me ask you this question, Doctor: Now, in view of the testimony you have just given, stating that the operation performed upon the man's knee and bearing in mind the fact that you knew people going about in that condition,—do you still think the man is permanently disabled? [59]

A. Yes, I think he is.

The COURT: He has answered counsel. You see in making that conclusion he has taken into consideration, just like the last Doctor, the nervous condition, which he feels would not be cleared up

(Testimony of Dr. E. E. Hobby.)

by the operation, according to his testimony. That is what you are facing in the testimony of this witness.

Mr. LYNCH: But he has testified he does feel the mental condition would be somewhat cleared up.

The COURT: Yes. In other words I don't want to argue. I am trying to assist you so that you can examine him on the point in question. He says that the condition of the leg aggravates the mental condition; but the mental condition alone apparently would be sufficient to disqualify him; that is your testimony isn't it?

A. I believe that is true.

The COURT: That's the way I understood your testimony.

Mr. LYNCH: Q. Doctor, in testifying the way you have you are having in mind the man's pre-war occupation as a sea captain, have you not?

A. Yes, I have that in mind.

Q. Do you think these disabilities which are alleged will prevent him from carrying on any gainful occupation?

A. I don't think a man of his age and after doing one particular kind of work all his life can adapt himself to anything whereby he would be able again to earn a livelihood. I would say that he was not totally and permanently disabled if at the present time he is earning a livelihood. It is true that during the period which I have covered from 1925 to 1930 he was earning a living at an average rate of Three Hundred ($300.00) Dollars

(Testimony of Dr. E. E. Hobby.)

per month, but he was breaking down all the time. The time would [60] come sooner or later with the progressive condition of his knee and his nervous condition, when he would have to give up.

Q. Yes.

A. I think his condition is worse now than it was before the knee was operated on.

Q. You think it is progressively getting worse?

A. I think he has a very bad result from his operation.

A. I am not qualified to speak on mental conditions, but he was very emotionally disturbed at the time I saw him.

Q. When was this, Doctor?

A. At the time I made my examination in 1933.

Q. But that wasn't in 1925?

A. I don't know his mental condition in 1925.

Q. Would you say, Doctor, that the operation that Doctor Linde performed made his condition any worse, or improved it?

A. He tells me and I have no reason to disbelieve what he says, that his pain has been relieved. A certain kind of pain has been relieved, I believe, but he still has a very painful knee. Aside from the relief of the pain as a result of the foreign bodies in the knee which cause extreme pain at times, I think the knee is in worse shape than it was before it was operated on. If the knee was ankylosed at the present time he would not have the pain that he has now as a result of a little extreme movement of the knee. Any undue movement of the knee

(Testimony of Dr. E. E. Hobby.)
causes great pain with him. That would be relieved because the knee would be immovable. This is not an uncommon operation but I think he would still have pain on various occasions, the result of the damage to the bone.

Redirect Examination.

Even though the knee were stiffened by the operation known as an ankylosis and the operation were successful, and infection did not light up at the time and it healed well, I [61] would say that there would still be a possibility of its lighting up at some future time. There is always a possibility that the osteomyelitis may break out again at any time with his heart condition, hypertension, high blood pressure, it would be more dangerous for him to undergo an operation than for one who didn't have such a condition. There is no question but that Captain O'Brien has had osteomyelitis and as treatment for this condition rest is a very important element and free drainage, plenty of time to let the process heal itself. A person with osteomyelitis should refrain from working and rest as much as possible. I have known of many cases who have gone about on their feet with chronic osteomyelitis.

Q. What happens when they do that?

A. They just have that aggravated condition going on all of the time.

Q. What would you say about the nervous condition? Would working and being about on this leg aggravate his nervous condition?

A. It would aggravate it.

(Testimony of Dr. E. E. Hobby.)

Recross Examination.

I did not find any active osteomyelitic condition in Captain O'Brien. I only found the remains of an old osteomyelitis. It is true that a man suffering from a healed osteomyelitic condition can continue on a certain type of work and can do it indefinitely. There is a possibility that it may light up. In a well healed condition it is possible but not probable.

DEPOSITION OF BARNEY MAGNUSON.

The deposition of Barney Magnuson, a witness for the plaintiff, was read in evidence and the same reads as follows:

I am Chief Engineer of the Steamship "Santa Monica". [62] I first met Captain O'Brien July 13, 1928, when I was First Assistant Engineer on the "Silver Spruce" and he was Captain. I made two trips with him to India and to Java. During that time Captain O'Brien was not physically well. There was something wrong with the right knee. He always used a cane and often times was confined to his bed for several days. I would confer every day with Captain O'Brien regarding the business of the ship, such as the speed, repair work to be carried on, etc. I would go to his office, as was customary, except when he was confined to bed, and he would then refer me to the mates. He also seemed to be very nervous and irritable and this condition was noticeable all the time I sailed with him. On one occasion I saw his leg and noticed

(Deposition of Barney Magnuson.)
that the kneecap was swollen to about twice its normal size. I would say that during the time I knew Captain O'Brien on the ship his services as Captain were unsatisfactory. He was incapable of performing his duties. I was called upon to do some of the work he should have supervised as Captain. In one instance in a storm in mid-Pacific we had a following sea, in other words the sea was following us; we were going in the same direction. It was coming up on deck. We had a storm door but the storm door was down. The seas got so big and it was after dark and we could not get the door on. So I went to Captain O'Brien and he asked me what I could do. I told him I would see what I could do about getting the doors on, so the First Assistant and I went down with chain blocks and managed to pull the doors down and secure them. It was the Captain's duty to supervise that. The Captain was sick in bed. During these two cruises he spent an average of 3 or 4 days a week in bed, that was the average during all of that time. I am familiar with the duties of a Sea Captain. I have followed the sea 15 years. [63] Generally speaking I would say the character of Captain O'Brien's services as master of the ship, on these two trips, was unsatisfactory.

Cross Examination

My acquaintance with Captain O'Brien covers the period between July 13, 1928 and September 18, 1929. During all that time he was master of the "Silver Spruce". Each of the two trips which we

(Deposition of Barney Magnuson.)
made took from five to six months and I have not seen Captain O'Brien since I left the boat.

As Chief Engineer I was in complete charge of the engine-room and engine-room crew.

Q. In case of a storm is it the duty of the captain to make fast a storm door?

A. Not exactly to make it fast. It is his duty to see that the doors are made fast and secured properly.

Q. And he asked you to see that that was done?

A. Yes.

Q. And you did that on the occasion you just told us about?

A. Yes.

Q. You saw that the doors were made fast at that time?

A. Yes. It is a fact that the Captain is the executive officer of the ship and he is the man who is responsible to the owners of the vessel for safe cargo and the vessel for the particular voyage for which he is engaged.

Q. Both of the voyages you sailed with Captain O'Brien were safe voyages were they?

A. Yes.

Q. And all the duties of the Captain of the "Silver Spruce" were discharged and the boat brought into port properly and safely? [64]

A. Yes.

Q. And you came into port safely?

A. Yes.

(Deposition of Barney Magnuson.)

It is customary for the Chief Engineer to report daily to the master of the vessel, if it is anything out of the ordinary. I was able to see Captain O'Brien whenever it was my duty to report and whenever I reported to Captain O'Brien he instructed me with whom I should take the matter up. If it was within my department, I executed the orders he gave, myself.

Redirect Examination

The "Silver Spruce" carried three mates and I have sometimes seen them doing the Captain's work. For instance, this ship did not carry a purser and on occasions when the Captain was confined to his bed it was necessary for the first and second mate to have the papers made out. I would say this happened three or four times. The boat could have been brought safely into port as far as the cargo and ship were concerned, by the mates, even though the Captain was in bed.

Recross Examination

The papers referred to are the necessary shipping papers which must be made out on each trip in connection with the cargo, etc. I know it is the practice on some vessels for someone else than the captain to prepare these papers but the captain must certify them. Whatever work was in connection with these papers I know the Captain always did it but there were certain occasions when the

(Deposition of Barney Magnuson.)
mate did it. I am not familiar with what the exact nature of this work was. All I know was that the papers were connected with the cargo which was was carried. On a ship of that size the Captain always made out the papers, but there were occasions on these trips when the Captain was unable to do it, he was sick in bed. Captain O'Brien acted as his own Clerk on the "Silver Spruce." [65]

TESTIMONY OF DR. KENNETH B. FRANCIS.

Dr. Kenneth V. Francis called as a witness on behalf of the plaintiff, after being duly sworn, testified on direct examination:

I am a licensed physician and surgeon, licensed to practice as such in this State. The Medical School I graduated from was St. Mary's, London; London University. Since leaving medical school my post graduate work has been as follows: in London, 1926, National Hospital, Queens Hospital, London Hospital. The National Hospital is a hospital for purely psychiatric cases. My specialty is neuropsychiatry. That includes nervous and mental diseases. At the present time I am connected with the staff of Stanford University, Assistant Clinical Professor of Neuropsychiatry—in other words I teach the subject of mental and nervous diseases to the student doctors at Stanford Hospital. I served during the World War in the British Navy. I also

(Testimony of Dr. Kenneth B. Francis.)

served since the World War in the British Navy in the Medical Department. My rank was Surgeon Lieutenant. I had occasion to examine the plaintiff in this case. Robert Chester O'Brien. I made two examinations, one on the 8th of September and one on the 11th of September, 1933. I examined Mr. O'Brien at the request of Mr. Gerlack for the purpose of ascertaining whether or not in my opinion he is permanently and totally disabled within the purview of this definition (Treasury Decision 20). Regarding the examination I made and the diagnosis arrived at, I made three types of examination, physical, neurological and psychiatric. From the physical examination he had what I diagnosed as osteo-arthritis of the right leg. He also had a slight enlargement of the heart, also had an irregular heart beat. The neurological, which has to do with the nervous system, [66] such as the working of nervous system—I found that his right arm and his right leg were quite weak; the right grip in his hand was weak, also his hip. When he came to me, he had a feeling, a sensation of numbness stretching right up to the upper two-thirds of his thigh; also a numbness stretching right up his right arm. That is the neurological. In the psychiatric, I found him to be extremely nervous to such a degree as to be given a diagnosis of psychoneurosis. The neurological findings, that is the numbness I took to be of hysterical origin, as it had no definite nerve disturbance; that is, the nerves which he had in his

(Testimony of Dr. Kenneth B. Francis.)
arm had a definite disturbance, but this numbness didn't follow that in the leg or the arm. Regarding the picture of the disease of psychoneurosis which I have just mentioned, what it is and how it affects the victim—the mind of each of us can be said to direct the functions of the body and they can be divided really into three divisions; the so-called automatic actions—walking, gestures, expressions of the face; those things which we apparently don't think about, but of course we must carry out and must have some kind of thought about. Then there is the memory; all of those things that have happened to us which have been seen, felt, touched. They come not only as pictures, but also come with feeling about them—pleasant or unpleasant etc. So memory is attached to what we call emotion and it is a function of the mind to be delving into past experiences and emotions and pick out what we need for the immediate moment. Of course the third direction of the mind is the conscious, directed thinking. If we wish to do an act, we don't wish to have all of the experiences of our past; we pick out only that which is useful to us. Also we don't wish to be thinking about such things as walking and gestures etc., we don't wish to be thinking about those things, but to concentrate on the thing [67] immediately in front of us. In psychoneurosis there is a disharmony between those functions whereby directed thinking and concentration on the immediate subject is much impaired; and things which

(Testimony of Dr. Kenneth B. Francis.)
one would normally not think about makes him oversensitive, and too much concentration is placed on them, of course hampering conscious thinking; or, on the other hand, it might be that memories and emotions going with the memories flood the whole system, producing an emotional set up and an emotional feeling which prevents any clear thinking on any present subject he wishes to concentrate on. Therefore bodily sensations can be over-emotionalized, that is, the emotions such as crying without any apparent reason—just because some past memory roused it; he didn't want to cry, nevertheless crying breaks out and he can't help it. Now, directed thinking, which of course, is our intelligent, intellectual self, can be grossly hampered in psychoneurosis by this disability here that is going on. It is my position that psychoneurosis alone is a permanently and totally disabling disease, even aside from his leg trouble, I believe that it is a permanent and totally disabling disease in Capt. O'Brien's case. I wish to say that, of course I can't agree that in any place that the leg and his nervous disease are not one; they cannot really be divided. So interwound, you have got to consider both together.

I have heard read the definition of permanent and total disability (Regulation 11, Plaintiff's Exhibit No. 7). I believe that at the time I examined Captain O'Brien, within the last month or so he was permanently and totally disabled within the purview of that definition. I have heard all of the evidence in court.

(Testimony of Dr. Kenneth B. Francis.)

Q. Now instead of repeating that evidence for the purpose of forming a hypothetical question, we will assume that the evidence you have heard in the courtroom here, including the statements of Captain O'Brien in his testimony, are substantially [68] correct; if that testimony is substantially correct, including his statements as to the history of the case, do you believe he has been permanently and totally disabled within the purview of that definition ever since April 1, 1925?

A. Ever since 1925, yes; and before that.

Q. If those statements are substantially correct, Doctor, give us your reasons for that?

A. Yes. There are several factors, just as in the psychiatric examination; we took the man's own statements and then check them with as many objective facts as we can find, which, of course, was done for me in court here. In 1925 we had one of the witnesses, Mr. Arseneau, who declared to a great degree of nervousness and also rather a strange behavior of the Captain, who called in at all hours of the night. Mr. Arseneau also complained that he had to leave the ship or wanted to leave the ship because Captain's behavior was too demanding on him. I am not sure about it—I think Captain Peterson made some remarks to that same effect as to nervousness. Then there was the record—the medical records as they were displayed. Doctor Linde mentioned nervousness and also in his opinion that occurred previously. There had been two examina-

(Testimony of Dr. Kenneth B. Francis.)

tions made, that is, psychiatric examinations and both of them agreed to neurasthenia. The other surgeons—there had been other examinations which have not been mentioned, it is true, but they were carried out as the psychiatric examinations. In other words, the two psychiatric examinations were carried out and both agreed to psychoneurosis. As to Captain O'Brien's own statement here on the stand, he stated that even as far back as 1920, that he was sleepless, that he could not concentrate, that his leg constantly bothered him, and there was one statement that even after the operation when he was supposed to be improved, that [69] the very fact of his leg being improved for a short while, the fact of that numbness bothered—showing that he had much over-sensitiveness in his feelings, much over-concentration on his injury. Captain O'Brien's further statements of sleeplessness; and I think I have mentioned most of them now—the tremors of the hands which he has; lack of concentration, his irritability, his giving up on several occasions. He apparently attempted to carry on, but every now and then he gave up in extreme despondency, great despondency he had. All of those facts together, and many of them objectively proved by witnesses, and other evidence, give me to believe it dated back to the first objective evidence, which I think was 1923; that at least from 1923 he was permanently and totally disabled.

Q. Doctor, I notice in this examination by Geoffrey H. Baxter, a Government doctor—neuropsychi-

(Testimony of Dr. Kenneth B. Francis.)

atric examination—he examined Captain O'Brien on March 4, 1933, it states "Present Complaint. Nerves all shot. I frequently cry for no reason at all just like a damn fool. I can't sleep and I tremble and shake. Frequently I get a sensation like an electric shock up the right leg and then I have to stop whatever I am doing for a moment." Is that compatible with psychoneurosis?

A. It is. That is compatible with my findings. It is true of Captain O'Brien. In rendering my opinion that Captain O'Brien has been permanently and totally disabled from April 1, 1925, I took into consideration his work on the ships as Master of these various ships since that time. I believe that during the time he was on these ships actually working, he was impairing his health in so doing.

Q. Explain that.

A. For the responsibility and worry as to the ship that [70] he had was constantly getting on his nerves. If I am permitted, I will put it this way: Captain O'Brien has an extreme amount of courage. It was his own courage, however, which really let him down because in this worry and responsibility that he had in the ship, it was only courage which kept him going, and that it was a terrific experience to his whole nervous system, not especially his mentality, and even if he had not been aware of it. This is a supposition; if he had rested and received treatment way back in 1923, I don't think he would be in the present condition he is now at all. I feel

(Testimony of Dr. Kenneth B. Francis.)
this largely is a direct result of lack of treatment and of the heavy responsibilities of the work that he carried out, or tried to carry out because he failed.

Cross Examination.

I examined Captain O'Brien on the 8th and the 11th of September, 1933, yet I am able to set his disability back to 1923, 10 years; the first objective evidence I have of his disability—I will explain that; there are various degrees of psychoneurosis. I cannot admit there are lesser classifications. Psychoneurosis is a matter of degrees. I consider his case of psychoneurosis to be one of a severe degree but I do not think I used that word. There are all degrees of psychoneurosis, from mild to severe. It is a convenient term to use the word "severe". It is convenient for the purpose in this instance—convenient to use the word "severe", but I would not give any limits which is mild or severe. Regarding the difference between psychoneurosis, hysterical state, moderate and severe which Dr. Baxter gives as "moderate", that is precisely why I would not agree to make those definitions depend upon each person—that happens to be my idea of "severe"; Dr. Baxter's would be different. I interpret and use the terms "moderate" or "severe" just as the dictionary defines them; my [71] testimony differs here from the doctor who said it was moderate; in other words I reach a different conclusion from my observations on that point, with this difficulty; what

(Testimony of Dr. Kenneth B. Francis.)
might be moderate to Dr. Baxter might be severe to me, and it is very hard to eliminate—I do not know what he means by "severe". I cannot agree that the medical profession classifies psychoneurosis as mild, moderate and severe. It is possible that what I mean by "severe" can be the same as Dr. Baxter means by "moderate". I believe in degrees of psychoneurosis. There is a National Committee for mental diseases in New York and it has a definite classification; but it is not purposely rated on degrees of mild or severe; it is rated on the type. Severity of course depends upon the length of its existence; I am alluding to the length of time it has existed. Now then, with this since 1923, 10 years, that is one reason; and the state he is in now—I should say he is severe. If, on the other hand, it would have existed one year and he would have come to me in a much better condition than he is now—I should say it is very mild. In other words, the term "severity" has two interpretations; one as to the length of time it has existed, the other, the prognosis, which means the likelihood of his getting well. In other words it is a question of duration and intensity. I think in this case if he had not the duration he has, I would not classify him as "severe". I think it is sufficient to be classed as either—both ways. I cannot agree that a man could be in this condition for only one month or so, and be in a worse condition than if he had it for 10 years. It is essentially a long time disease. It is possible that Dr. Baxter in his examination and

(Testimony of Dr. Kenneth B. Francis.)
in his diagnosis as "moderate" could mean the same thing I mean my saying the man's psychoneurosis was "severe". That is possible. Subject to limitations there are degrees of psychoneurosis. [72] This man passed through the various degrees. I think he missed the first step. The first step would be the general working up of his constitution towards his nervous disability. It strikes me that the two explosions he suffered carried him over the first step. The second step was at the time of the explosion, nothing but his own words for this. I am not taking plaintiff's testimony, not even that; what he said in my office regarding the explosion. The third step came from then on, from the explosion on. Regarding when the transition took place from the first to the second step, of course I cannot clearly define the limits between the first and second step. I have what the patient told me in my office, which I understand I am not entitled to consider. Of course in any psychiatric examination, I would have to have objective evidence from the outside as to whether his statements were even partially true. The first objective evidence I have is in 1923. That is why I give that date of 1923 that he was definitely psychoneurotic that date. If the man had not been telling me the truth, my diagnosis would not have been correct. I based my opinion on the history he gave me on the stand and other witnesses. I have plenty of objective evidence besides what he just told me in my office. This psychoneurosis which is present and which we can conveniently call "severe"

(Testimony of Dr. Kenneth B. Francis.)
is interwoven with the leg condition. Even if it can be shown that the leg condition can be greatly alleviated—that the pain can be greatly removed from it—that would not change the psychoneurotic condition. They are interwoven—not in a reversible direction; in other words, once a habit is formed such as this disease, it would be a very hard thing to reverse it. The nerve condition is due in a degree to the condition of the man's leg, it is aggravated. If it were possible to entirely alleviate the pain and all disorder in the leg, that [73] would not necessarily relieve the mental condition—if it is relevant—it is possible that Captain O'Brien will become a patient at Stanford and if I had to make the same statement to him then, while I don't think he can be cured—this is quite outside of the court case—I think he can be somewhat improved, but not cured. I think we can do a little for him but I am afraid not anything that would amount to much.

Referring to the diagnosis as given for psychoneurosis in the different medical examinations here and the three terms used, namely: mild, moderate and severe, I am aware of some of the examinations mentioned, but of course I have to stick to the American Psychiatric Examination rulings in the matter, in other words in a very conservative opinion there can be no such degrees except as stated, as I have stated to His Honor.

I testified in these cases before for Mr. Gerlack, once. I do not know just how the doctor who made

(Testimony of Dr. Kenneth B. Francis.)

that report, interpreted those terms, whether he interpreted them as I did, I based my opinion on the neurological examinations which were shown to me, two of them. Concerning the neuropsychiatric examinations and the degrees of psychoneurosis which were given on those neuropsychatric examinations, without referring to it, I do not think I could tell you off-hand without refreshing my recollection, I couldn't tell the actual degree. I am sorry, but I still have to repeat that the particular degree cannot be answered. I base it on two things—length of time and intensity. In those reports, that is not the whole report by any manner of mean, we partly discount those particular words. I would not have paid much attention to that feature. Psychoneurosis is the diagnosis made. If the terms used by this doctor who made the examination were being used in the same sense that I use the terms, I would differ from [74] him. I think the man himself is in a better position to tell me the man's condition. In basing my opinion and in setting the time as to the man's permanent and total disability, I took into consideration the statements made by the man from the stand. I was present when the question was read from this application for reinstatement of yearly renewable term insurance: "Are you now in as good health as you were at the due date of the premium in default? Answer: Yes. Q. Are you now permanently and totally disabled? Answer: No. Q. Have you been ill or contracted any disease or

(Testimony of Dr. Kenneth B. Francis.)
suffered any injury or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapsation of this insurance? Answer: No."

Captain is of a very curious point of view; he seems to distinguish between sickness and illness and disability, which also he stated in regard to those particular things. I took into consideration the fact that in 1926, seven years ago, he made these statements. If those statements were true, of course my diagnosis would be incorrect; but I do not accept them as having been true—that is the situation. It is in direct conflict with his whole tale. I do not take the statements Mr. O'Brien made at that time to be true. Regarding the statement made by Captain O'Brien in January, 1926, when he wrote—"I have been in Puget Sound several days loading for South America and have lost considerable sleep in moving the ship from port to port, and I am positive that my heart action is normal under ordinary conditions, as I have never experienced any symptoms that would lead me to believe otherwise. I also was a little nervous in passing the examination as the loss of this insurance would be a great blow to me." I don't think that was true. It was making it very mild [75] when it was very severe. Why did he lose so much sleep? He slurs over that, gave us no reason for that, and regarding his statement—"* * * and have lost considerable sleep in moving the ship from port to port"—in other

(Testimony of Dr. Kenneth B. Francis.)

words his duty was such as to considerably upset him. Regarding the statement made by Captain O'Brien—"I have lost considerable sleep in moving the ship from port to port"—and "My vessel carries no doctor (in which case as Master I am also the ship's doctor), and as evidence of my health I can only certify on honor that since September 1919 I have been actively engaged without a break as Master of vessels in foreign trade, and as far as I know, am in as good health as at the time of my being commissioned in the Navy"—I understand he denied that on the stand. I took into consideration the fact that he wrote that letter over his signature in 1925 to that effect, in direct conflict to his previous evidence. I entirely disregarded all of the signed statements the man made; disregarded the fact that he was applying for reinstatement of his insurance at the time I say he was permanently and totally disabled. I am trying to convey to you the impression that the man was either mistaken or was highly exaggerating his condition at that time, but now,—if you mean making him much less mild than he was,—for the reason that "o" has economic pressure behind it. He had a wife and child to look after."

Redirect Examination

In other words, in these examinations of Dr. Wheate and Dr. Baxter, which findings have been read to me—in other words, I concur in their findings but disagree with them in their conclusions. I

(Testimony of Dr. Kenneth B. Francis.)
agree with the diagnosis of psychoneurosis. Their findings for instance, that he cries, etc., these other findings in their examination report—I agree with their findings but [76] disagree with their conclusions as to the extent of the diagnosis, as to the degree of severity, in other words I think they are right in the premises but wrong in the conclusions, always supposing that they mean what I mean. Now regarding these statements, I think it is possible that Captain O'Brien has been severe from that date and not himself been aware of it—that is the nature of it—the very nature of psychoneurosis.

Recross Examination

I examined Captain O'Brien for the purpose of finding out his condition at that time and for the purpose—it developed during the interview—for the purpose of treating him.

TESTIMONY OF WILFORD P. DUHAMEL

Wilford P. Duhamel, called on behalf of the plaintiff, after being duly sworn, testified as follows:

I am Assistant Secretary of the American Legion War Memorial Commission. I have the concession in the club room for the refreshments up there. I have the management of that. Captain O'Brien works in that concession. So far as his physical condition is concerned, which I myself observed in the man-

(Testimony of Wilford P. Duhamel.)

ner in which he performed his duties up there—the leg disability naturally is very apparent and I have noticed his nervous condition which is usually apparent—sometimes more aggravated sometimes less. I would not say he works steady up there. I work two shifts there. I work from about noon until midnight; sometimes from ten in the morning to midnight and Captain O'Brien comes in sometimes during the morning, sometimes during the afternoon, sometimes during the evening; but it is not at all dependable what hours he will work. Many times during the time he has been up there, I have seen him leave and go home during the time when he was supposed to be there. I have seen him up there obviously ill. I do not believe I can [77] tell you any specific occasions and dates and time; many times when he is apparently in pain, obviously. Any movement he makes is painful to him, at times extremely nervous. His position up there—his employment is somewhat temporary; he is there with me. I guess it is permanent as far as I am concerned because the man stays with me out of pure friendship, no other reason. None of us on a permanent position.

Q. Did you employ him for the reason that you thought he could perform the services, or did you hire him because you felt sorry for him?

A. Well, it is not that you feel sorry for a man that you hire him. If I was hiring a man for that position, it would not be the Captain, if I was look-

(Testimony of Wilford P. Duhamel.)
ing for 100% efficiency; if that is what you mean. I hired him because I felt sorry for him.

The COURT: Did you feel that he could give you substantial aid, or was it merely a charitable matter, or both aid and chairty?

A. I say both. I need a little help, if he would fill that bill. It is not as if I needed a man for the work to depend upon him all of the time. He would not do.

Cross Examination

Regarding the income from this concession in the Veterans Building, I will say perhaps when I first opened the concession it was about $60 a month; it sometimes runs as high as $250 a month; that is net. I would say it is running less than $250. Captain O'Brien gets 40% out of that. Now, out of the net, which is around $250, I pay him 40%, or around $100. I am not present at all times but I am in the building on an average of 12 to 14 hours of the day. The average time that I am operating that concession, I would say is about 12 hours of that time, 12 hours a day, that is when I am actually there, I do not mean when [78] I have it open. Captain O'Brien is left in complete charge of that concession sometimes 2 or 3 hours at a time. That is not every day. At no regular time is he in complete charge of that during the day. There is sometime, for instance, when I go out to lunch, that he is left in complete charge. I am operating this on the basis that he takes 40%; we are not partners in the venture, not

(Testimony of Wilford P. Duhamel.)

exactly. I am the manager of the concession, it is my concession. I pay him 40%. The expenses are paid out of the income of the concession, but I give Captain O'Brien 40% of the profit. At the present time it is around $100 per month or less; no, I would not say it was $100 per month. I say $100 or less; I could not state unless I looked at the book. I do not think it ran a hundred the last couple of months. Captain O'Brien has been there I believe since April, I am not certain of it. I believe it has not run $100 the last couple of months. I said around $250. I think last month—I can't tell accurately without the books; I think $220 to $225. Captain O'Brien drew down last month close to a hundred dollars. I think the highest the net has gone is about two sixty.

DEPOSITION OF NORMAN SWARTLEY.

The deposition of Norman Swartley, a witness for the plaintiff, was read in evidence and the same reads as follows:

I have been a master mariner for fifteen years and served with Captain O'Brien on the Steamer "Rotarian", the name of which was later changed to the "Condor". I don't remember the exact dates but it was during the time that Captain O'Brien was master of the "Rotarian". I was first, third mate, then second mate, then first mate. I observed that Captain O'Brien used to be laid up. He com-

(Deposition of Norman Swartley.)
plained of his leg, walked with a limp, and there was a time for two weeks straight that he gave me complete [79] charge of the ship and never got out of bed. I don't remember the date. I used to communicate with him regularly and also spoke to him through the tube. It was his duty to navigate the ship providing he was not laid up. When he was laid up it was my duty to take it over. I also noticed that he was nervous and irritable at times. At those times his face was drawn as though he was in misery. In fact, I had the carpenter make a chair for him so he could sit on the bridge and rest his leg. The purser took papers ashore for him but not always. In places where there was a dock or breakwater the Captain could get ashore. The round-trips on this boat used to take about four months. When we would go into Puget Sound the Captain would take the ship in himself if he was up. If he was not up I would take the ship as far as Port Townsend, then the pilot took it. When the pilot took the ship in it was the Captain's duty to be on the bridge. All in all I guess the Captain missed about one-half of the time he should have been on the bridge.

Cross Examination.

When Captain O'Brien was on the bridge with the stool, he could sit on it and perform his duties with the exception of taking sights. These were taken by the mates and were always done satisfactorily. I was with Captain O'Brien for about three

(Deposition of Norman Swartley.)

years and during that time the ship was successfully navigated on every voyage. We never had any accidents and the ship was brought into port successfully every time. There was never any time when Captain O'Brien was not in communication with the parties who were doing any of his work. That was also true when the pilot was on the bridge. The period during which I mentioned Captain O'Brien was in bed two weeks, it was while we were at sea between Peru and the United States. We did not call at any ports during that [80] time and nothing unusual happened. The Captain was in communication with me at all times during that two weeks period.

DEPOSITION OF JOHN E. McLAUGHLIN.

The deposition of John E. McLaughlin, a witness for the plaintiff, was read in evidence and the same reads as follows:

I am Purser on the SS "Capac". I served with Captain O'Brien as Purser on the SS "Rotarian" between October 24, 1925 and June 12, 1927. The Captain was on the ship during all of that time except during the early part of 1927 when he went to the Marine Hospital. Captain O'Brien had trouble getting around the ship, especially in rough weather, on account of his right leg, and lots of times he was confined to his bed during working hours. I could not say whether it was on account

(Deposition of John E. McLaughlin.)
of the injury or not. He could not rest his weight on the leg. I performed some of Captain O'Brien's duties for him. For instance, I would take the ship's papers ashore to the Consul, the register of the crew lists, etc. This is usually done by the master of the ship but in South American ports, where the ship lay out in the open roadstead, or bay, and at times due to rough weather, Captain O'Brien could not navigate the gangway due to his disability and I would act as captain in those cases and take the papers ashore. I did this nearly all of the time. The ship's papers are usually signed in my office but I would take them up to the Captain and he would sign them in his room, at times in bed. Judging from his appearance and facial expression he did appear to be suffering. I observed that the first officer, Mr. Swartley, performed lots of Captain O'Brien's duties. For example, lots of times when Captain O'Brien was confined to his bed, the ship would pass a lighthouse and the mate would call down through the tube phone and tell the master this and the Captain would direct the mate what course to [81] put the ship on. Ordinarily the Captain would go up on deck to verify this. I ate at the same table with Captain O'Brien when he came down but he had about 90% of his meals in his room. Going up and down ladders he made very slow headway. He helped himself with his arms, favoring his right leg. I also noticed that when we weer up in Puget Sound he was a little slower when the weather was wet. I very seldom saw Captain

(Deposition of John E. McLaughlin.)
O'Brien up on the bridge navigating the ship. He got about the ship with a limp and used a cane most of the time.

Q. Confining your answer to what you yourself observed, what percentage of the Captain's work on the ship would you say was performed by other members of the crew but the Captain?

A. That is a difficult question to answer because I know that I did a lot of his work, but as far as the navigating is concerned, that was performed by deck officers not in my department, so I could not say what percentage of the work they performed, although I knew they were doing some of it.

Q. You know that yourself, do you?

A. I could not swear what percentage. I know I did all his duties on shore, that is, practically all.

Cross Examination.

As far as I know I believe Captain O'Brien received his salary for the voyage during which he went to the Marine Hospital.

DEPOSITION OF DAVID HURST.

The deposition of David Hurst, a witness on behalf of plaintiff, was read in evidence and the same reads as follows:

I am the master of the Steamer "Cowa". I have known Captain O'Brien for twelve years and served with him first some time in the summer of 1923 until the spring of 1924. This was the [82] "Santa

(Deposition of David Hurst.)
Malta", a 10,000-ton ship. Captain O'Brien appeared to me to be always lame and at times you could hardly talk to him. His leg seemed to be affected. He was always complaining about his leg. He appeared to be in pain. This was all quite a while ago and I don't remember anything about his facial expression. When I was first mate I shipped in port. Captain O'Brien was in bed and unable to come on the bridge. I was mate and he was master. I also sailed with Captain O'Brien on the "Santa Cruz". We both left the "Santa Malta" together. Captain O'Brien went directly to the "Santa Cruz" and I went on it about a year later. We made one trip to Antofagasta and then went on the "Cacique". We went on the "Rotarian" in February. I was the third mate. While we were on the "Cacique" he appeared about the same, only coming into San Francisco on that trip he could not get on the bridge and the pilot had to bring the ship in. On other trips the Captain brings the ship in, assisted by the pilot. On the "Cacique" the pilot brought the ship in and Captain O'Brien was in his room. He was not able to get out. I know that myself. I was with Captain O'Brien until June 1927 on the "Rotarian". The mates always had to do his work. I know because I did part of it, such as taking the ship in and out of port because Captain O'Brien was not able to get up. He would be in his room in bed and he would seem like a man in agony. At times he seemed like a nervous wreck,

(Deposition of David Hurst.)

could not sleep, could not keep quiet, rolled and tumbled. The ship did not carry a doctor.

Q. What percentage of the time during the time you were Chief Officer or First Mate on the "Rotarian" did you bring the ship in for Captain O'Brien.

A. I do not know just how to answer that, because it happened so often we got so we paid no attention to it. I would say that I brought the ship in myself [83] not quite half of the time. The Purser did the Captain's paper work on the ship. When the ship was lying port on these trips to South America generally the Purser went ashore with the ship's papers. It is the Captain's duty to call on the Consul and take the ship's papers. The Purser did that in every open roadstead when the ship was lying out in the open anchored there. When I left the "Rotarian" in 1927 Captain O'Brien seemed to be getting worse. During the time I served with him I put him in the hospital at Antofagasta at one time and at Callao at another time. Captain O'Brien's condition was always worse, or appeared to be worse, just before bad weather.

Cross Examination.

Captain O'Brien was in the hospital at Antofagasta for a short time and in Callao for about twelve days. These periods were on different voyages. We made in all about twelve voyages and I don't remember the Captain going to the hospital at any other time. In the South

(Deposition of David Hurst.)

American ports we used to call in about ten or fifteen ports going down and six or seven coming back. He would not be able to take the ship into half of the ports. In the beginning he was not so bad but he kept getting worse. On the occasions when some one else had to bring the ship in they were in communication with Captain O'Brien by tube and the ship was always successfully brought in. I have served as first mate under other masters but have never brought the ship in for any of them. I never heard any complaint about the papers not being delivered properly. Although the Captain did not go ashore himself, everything was done in regular order. We suffered no mishaps to the vessel and all voyages were successful during the time that I served with the Captain on the three vessels which I have mentioned. I never heard any complaint about how the ship [84] was managed on these voyages. On two occasions, once on the "Cacique" and once on the "Rotarian" the pilots brought the vessels into San Francisco Bay while Captain O'Brien was Master,—to my knowledge. On neither of these occasions was Captain O'Brien on the bridge, he was in his room in bed; he was in communication with the pilot on the bridge, through the tube. The ship was brought in successfully on both occasions. On both of these occasions I was on the bridge with the pilots and in communication with the Captain. It is the duty of the First Officer to do the work I did on these occasions,—it

(Deposition of David Hurst.)

is, and it is not—it has to be done—somebody has to do it. It is not the duty of the First Mate when the Captain is aboard ship, but it is his duty when the Captain is not able to. It is the First Mate's duty to do it whether requested by the Captain or not,—it has to be done. If the Captain asks him to do anything,—cooperating with him and under his orders, it is the duty of the Mate to do so. I do not know whether at any time while I served with Captain O'Brien on any of these ships I have mentioned, Captain O'Brien was laid off by the owners of the ship. He was continuously employed in connection with his duties. I surmise he was paid a salary during all of the time,—I do not know. After I left the "Rotarian" I know that Captain O'Brien continued for a certain length of time, to navigate ships, because we were working in the same company.

Redirect Examination.

The fact that the ship was properly nevigated was due to both Captain O'Brien and the Mates. I have had twenty years experience as a master mariner and I would say that his knowledge as a master of a ship was excellent, more than ordinary, but his physical ability did not fit him. [85]

DEPOSITION OF DR. WILLIAM G. DORAN.

The deposition of Dr. William G. Doran, a witness on behalf of Plaintiff, was read in evidence and the same reads as follows:

(Deposition of Dr. William G. Doran.)

I am a duly licensed physician for the State of New York and a graduate of the University of Cornell in 1911. As far as I can recollect, I examined Captain O'Brien August 29, 1927, at the Marine Hospital, No. 70, New York during my course of routine duties as consulting Orthopedic Surgeon. At that time he gave me a history that his disability of his right knee had extended from approximately the year 1912, at which time his leg was broken, and a second injury to his knee in 1916; the third injury is 1918. As a result of these injuries he was complaining of a disability in his right knee and his leg at the time of my examination, which was the first time I saw him in August, 1927. I examined him with the object of finding out if possible the degree of deformity in his knee. My examination disclosed that he had a destructive type of arthritis of his right knee joint, with a deformity which prevented a considerable amount of normal motion of that knee joint. There was a limited amount of motion but it was relatively small, far less than normal. An X-ray examination which supplemented my physical findings disclosed that the patient's loss of function was due to a degree of injury in the right knee joint. The X-ray which I used was taken by one of the other doctors in the hospital and it showed that the injury, which we would call infective arthritis, produced the disability which was then existing, namely, restricted use of the joint and pain in the use of the joint. I recommended that he submit to an operation in his knee joint. As far as I recol-

(Deposition of Dr. William G. Doran.)
lect that was the last time I saw him, and on August 29. 1927, I believed him to be totally [86] disabled and I do not think he had the ability to go out and compete with men of sound mind and bodies and average attainments under the usual conditions of life and do it continuously and make a decent living at it.

Cross Examination.

I examined Captain O'Brien in the regular course of my duties.

Q. You stated that in your opinion the plaintiff in this action was permanently and totally disabled at the time of your examination in 1927, by that you mean that he could not follow continuously any substantially gainful occupation of a manual type, in stating that opinion did you take into consideration the mental attainments of the individual?

A. I think so, yes.

Q. Were you aware of the work which he had been customarily doing prior to that time?

A. He told me that he was a seafaring man.

Q. Would your opinion, which you have just given, be influenced by the fact, and I submit Mr. Hurley that these facts will be proved in evidence at the time of the trial, that prior to your examination in 1927, that is from 1925 to 1927 that he had been following his occupation as a seafaring man?

A. The facts that you have just related were told to me also by Mr. O'Brien. The only important change in that would be that he did not work con-

(Deposition of Dr. William G. Doran.)
tinuously, as a seafaring man, but that due to the disease he had to be interrupted frequently for treatment. Giving my opinion as to his total and permanent disability, I think I took into consideration his mental attainments, however if he was able to pursue his normal occupation of course my opinion would be subject to that fact, that is, if he were able to pursue it continuously. I don't know whether or not he followed the suggestions [87] I gave him as to treatment. I could not state that in 1925 he was totally and permanently disabled according to the definition, but I can state that in 1927 he was permanently and totally disabled. Captain O'Brien, if he had the mental ability and proper training and was qualified, could be a doctor or lawyer but could not follow it continuously in the light of his previous physical condition. As a result of my examination in 1927 I would say that it was reasonably certain that the condition I found would be present throughout the entire life of the patient in varying states. If he had followed with an operation I can't say whether his disability would be total, as it is just guess, and I don't want to give any false opinion.

Redirect Examination.

The statement that the patient was totally and permanently disabled within the definition at the time I examined him is my opinion not my diagnosis but if the physical condition of the patient as I determined it on August 29, 1927, was similar

(Deposition of Dr. William G. Doran.)

and equal to the physical findings on March 31, 1925, my opinion would be that he was totally and permanently disabled at that time.

(Mr. Lynch) Inasmuch as plaintiff rests, we would like at this time to make a motion for a directed verdict inasmuch as no evidence has been brought forward to show that this man was permanently and totally disabled at the time his policy lapsed and on the further ground that it has been shown that this man worked practically continuously from before the time his policy lapsed until 1930; as a matter of fact it has been shown this morning that he is working at the present time.

(The Court) Motion denied.

(Mr. Lynch) May I have an exception?

(The Court) Yes. [88]

TESTIMONY OF ERNEST WRIGHT

Ernest Wright, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am the Pacific Coast representative of the Kerr Steamship Company.

Q. Will you tell us what the records show as to when Captain was employed by the Kerr Line and how much salary he received?

A. Captain O'Brien was employed, actually on the ship, on January 31, 1928.

Q. He was actually on the ship at that time?

(Testimony of Ernest Wright.)

A. At that time, but he was employed about a month prior to that time while taking the ship over, —looking after our interests. He wasn't actually Master at that time. The position as Master did not commence until January 31st. He continued as such until about the 26th of February, 1930, when he resigned. He received $300 a month salary. When a man resigns we have the practice of not reemploying him. If he had not resigned we would have continued him in our employ. The Kerr Line had no objections to his continuance.

TESTIMONY OF CLARENCE A. NELSON

Clarence A. Nelson, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am Auditor of the W. R. Grace Company. I am custodian of certain records of that company and have with me the salary and employment record of Captain O'Brien. He first went to work for the Grace Company on February 2, 1924, as master of the SS "Santa Cruz". He continued on that ship until December 25, 1924. He was receiving a salary of $270 a month, plus $25 a month for uniforms. He transferred to the SS "Cacique" and remained on that [89] ship until February 11, 1925. The salary he received during that time was also $270 and $25 a month uniform allowance. He transferred to the SS "Rotarian" on February 11, 1925, as mas-

(Testimony of Clarence A. Nelson.)

ter and continued on that ship until he left the Company's employ on June 12, 1927. His salary remained at $270 a month and $25 uniform allowance until April 30, 1926, and thereafter he received $300 a month. Captain O'Brien resigned of his own accord.

Q. Do you know why Captain O'Brien left the employ of the Grace Company?

A. Only what I heard. I understand illness.

Cross Examination

I did not know personally if Captain O'Brien's work as master on the ship was performed by the mate or purser.

Q. By the way, isn't it a fact that he resigned from the Grace Line as master to enter the hospital?

A. I understand there was a certification at that time and also he was away on a thirty-day leave. The books show he took a thirty day leave on account of illness.

Redirect Examination

Captain O'Brien was paid his salary during the time he was on sick leave.

TESTIMONY OF
DR. EDWARD W. TWITCHELL

Dr. Edward W. Twitchell, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Dr. Edward W. Twitchell.)

I have been a duly licensed physician in California for forty years and I am a graduate of Cooper Medical College. I have done a great deal of post-graduate work in German and French schools from 1895 to 189 and then in 1908 for a period of seven months in German and French schools. I have specialized in nervous and mental diseases and at the present time I am [90] Professor of Neuropsychiatry at the University of California. I also established and at the present time I am Director of the Psychopathic Ward in the University of California Hospital at San Francisco. In a general way physicians don't classify psychoneurosis except to say one is worse than the other. For Bureau purposes in the Veterans Administration they are classified as mild, moderate and severe. The diagnosis of psychoneurosis, mild, generally means that it is of such a degree that it does not incapacitate the individual at all. It does not entitle him to compensation. A moderate degree of psychoneurosis means that it is severe enough to be a definite handicap to him in his work or profession and justifies the giving to him of a greater or less amount of compensation. Whereas the degree of severe means anything up to total disability. A man with severe hysteria would not be able to carry on. A mild degree of hysteria would be compatible with a man holding a responsible position of that sort but a severe degree of hysteria would certainly incapacitate a man for any very responsible position. If Captain O'Brien were employed by various steamship companies as master mariner

(Testimony of Dr. Edward W. Twitchell.)

in full charge of their ships at salaries ranging from $275 to $300 a month up until 1930, I can not conceive of a man with severe hysteria being employed at any very exacting occupation. Severe hysteria is really a very disqualifying thing and I don't think he could do even fifty percent of the work. A man who is suffering very severely from pain, or greatly crippled, would naturally find his psychoneurosis greatly increased. If he could be relieved of pain it would likewise be a very beneficial thing. Hysteria, as I understand it, is a condition which is movitated. In other words, a man or woman with hysteria, has an end in view and not necessarily conscious of it. A man becomes hysterical and a woman becomes hysterical [91] for various reasons. They are endeavoring to achieve a certain goal, whatever the goal is, and they are getting at it by a devious route instead of by a direct route. The goal may be an escape from a sentence of some sort or may be getting rid of some intolerable situation. A man will be hysterical because there is a certain situation in his own business which he dares not face, and as long as he is hysterical he does not have to face the situation. He can avoid the difficulties by being hysterical. If the difficulty is cleared up the hysteria and its manifestations are cleared up along with it. Plenty of people become hysterical in a desire for compensation. State records are full of individuals who are hysterical during the time of litigation. When the litigation is finished, often times even for or against, the hysteria is finished.

(Testimony of Dr. Edward W. Twitchell.)

Cross Examination

The bird illustration is simply an explanation of what hysteria is,—the nature of hysteria. Neurasthenia is rather a different situation: a neurasthenic is an individual who has this condition of abnormal tiredness, abnormal exhaustion and neurasthenia is not motivated. You do not find the same motives nor you don't find the same manifestations. You cannot say for example that neurasthenia paralyzes the anasethetic areas that you find in hysteria. The terms psychoneurosis, hysteria and neurasthenia are really contradictory, the two things really do not co-exist. I never examined Captain O'Brien in my life,—never saw him before I came into the court room; I do not know whether he was totally and permanently disabled and I am not in position to say,—I do not know anything about him. There is such a thing as traumatic neurasthenia. It is a neurasthenia caused by some terrible experience such as being blown up by a mine, [92] —things of that sort, yes. It is a fact, if it were shown to me that in the spring of 1919, while sweeping up mines in the North Sea, the minesweeper had a German mine get afoul of which is known as a kite contraption alongside of the boat that sweeps in these mines and while reeling it in, when the mine alongside of the ship, the mine blew up,—the mine weighing approximately 900 pounds, —the large portion of that being the bursting charge, and it blew up, and the concussion threw

(Testimony of Dr. Edward W. Twitchell.)

Captain O'Brien across the deck and underneath a large spool that reeled in the mines,—it is a fact that an experience like that could have been the cause of traumatic neurasthenia or trauma psychoneurosis. Things of that sort frequently cause a traumatic psychoneurosis,—hysteria or neurasthenia anxiety neurosis. I am not contending in this particular case that Captain O'Brien is assuming a hysterical attitude in order to get a verdict out of this jury, or to get any benefit from the Government,—I am not assuming anything.

Redirect Examination

Psychoneurosis, which follows traumatism, should come along very shortly after the actual injury or shock. It does not have any long period of waiting, months and months, and years and years. Trauma neurosis should follow very shortly upon the traumatism.

TESTIMONY OF DR. PAUL E. JOHNSON

Dr. Paul E. Johnson, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am a physician and surgeon, graduate of the University of Louisville. At the present time I am Chief Surgeon at the Veterans Hospital at Palo Alto. I made a surgical examination of Captain O'Brien when he was a patient at the Veterans

(Testimony of Dr. Paul E. Johnson.)

Hospital at Palo Alto, July 13, 1931. At that time I found limitation [93] of motion in the right knee, which was severe and due to arthritis, former injuries and operations on the knee. I think the condition could be alleviated to a very large extent by an operation. This would consist of an excision of the knee, which means cutting out the joint's surfaces and causing the bones of the leg and thigh to grow together. That does away with the synovial membrane and cartilage in the knee which causes the pain, making a union between the femur and tibia. A man of course has a stiff knee following the operation but he is relieved of his pain. The leg is usable after the operation. This is not an uncommon operation and I have performed them myself. A man who has a stiff knee is very likely to be awkward in moving about and very frequently they throw an undue strain on the knee, producing acute inflammation of the joint. These repeated traumas are the cause usually of his incapacity. In other words, while he has no acute condition in the knee, he gets along fairly well and the only inconvenience being the loss of motion which he has. When he stumbles and hurts the knee he has an acute inflammatory condition set up which may last anywhere from a week to two or three weeks, or a month or more. By doing away with the knee joint and cutting out these surfaces that become inflamed, we do away with that pain. The case which I referred to as having operated on this year, and

(Testimony of Dr. Paul E. Johnson.)

the conditions we are just speaking of, are similar. In that operation I removed the entire joint surface and caused a union between the bones of the thigh and the leg, with very good results, and he was entirely relieved of his acute symptoms and was able to get about more satisfactorily on the knee. In this particular case I would not only recommend that type of an operation but I did recommend it at the time O'Brien was in the hospital at Palo Alto in 1931. [94] The Captain said to me he wanted it done but his business affairs were such that he couldn't spare the time then but he would come back later and have the operation. A man with a knee in the condition that it would be in after an operation of that sort is performed would be able to carry on any occupation. He would not be incapacitated very greatly except for a position that required an unusual amount of manual labor or heavy work.

Cross Examination.

I am sure that I am referring to Captain O'Brien when I say he told me he could not have an operation on account of business affairs because I have it in my records. At that time he told me he wasn't doing anything. It is not likely that an operation on the knee would cause the osteomyelitis condition to flare up again. I did not make a diagnosis of osteomyelitis although it is likely he did have it at one time. That is my signature appended to "Plaintiff's Exhibit #6", and where it says "osteomyelitis

(Testimony of Dr. Paul E. Johnson.)

right knee, apparently quiescent", the word "quiescent" means that he had it in the past but not then. We use the term "apparently" quite often when we are very sure that it is quiescent. The expression "once osteomyelitis, always osteomyelitis" is sometimes used among orthopedists but it refers to conditions in which you have periods of suppuration in osteomyelitis. No evidence of any suppuration in this case at all.

Q. What is the cure for osteomyelitis, Doctor?

A. Well, there is no cure other than nature sometimes cures it herself; not only sometimes, but very often.

Q. Should a person with osteomyelitis work?

A. Yes, if it is not active.

Q. Is it advisable for a person with osteomyelitis of the kneew to walk around and bend the knee, or should the knee be at rest? [95]

A. Yes, in period of quiescence and remission there is no harm done at all. I do not know whether Captain O'Brien was suffering from any nervous trouble at the time I examined him because I did not examine him for that. Captain O'Brien might have been permanently and totally disabled from a nervous trouble known as neurasthenia, and I, being an orthopedic specialist and not a specialist in nervous and mental diseases, could not say whether that is true or not.

TESTIMONY OF MERRILL C. DARR.

Merrill C. Darr, called as a witness for defendant, after having been duly sworn, testified as follows:

I am General Auditor for the McCormick Steamship Company and I have with me the records relating to the employment of Captain O'Brien. The records show that he was first employed September 24, 1927, as Second Mate on the "West Cactus" and continued in that capacity until December 18, 1927, receiving a salary of $150 a month. He received all told $425. The records do not show why he left the employ of the Company.

DEPOSITION OF MAX BLIESATH.

The deposition of Max Bliesath, a witness for the defendant, was read in evidence and the same reads as follows:

I am first officer of the Steamer "Charles McCormick" and was master of the "West Cactus" when O'Brien was second officer. From September 24 to December 18, 1927, Captain O'Brien performed all the duties of the second officer during that time in a satisfactory seamanlike manner. He stood the twelve to four watch afternoon and midnight and always stood his regular watches. It was also his duty to go into the hold of the ship and see that everything was stowed properly and in such a manner as it will come out properly at time of discharge, and Mr. O'Brien performed [96] all of these duties.

(Deposition of Max Bliesath.)

Cross Examination.

I noticed that O'Brien was limping pretty badly but he never complained about anything. I believe he mentioned that he got hurt during the war. He had a little difficulty in getting around but he did his best. I never noticed any of the other boys helping him out any. It is possible that he might have gotten some help but I never helped him myself nor observed anyone else doing it. As second officer he did some navigating, such as taking observations at sea, keeping up the logs and all the clerical work pertaining to navigating. It was not necessary that he be on his feet to any great extent as there is nothing there to keep him on his feet. I have seen lots of fellows follow the job very capably on one wooden leg.

Redirect Examination.

Even though O'Brien limped, he was able to perform his duties on the "West Cactus". There is really no hard labor attached to it. I don't know when he left the "West Cactus", only know he went on as master of another ship.

Recross Examination.

I don't know of O'Brien being in bed with his leg on that trip. As far as I know, he performed his duties. If he had been laid up sick it would have been entered in the ship's log.

Q. If any of the boys or any of the mates were trying to help him out, would it be a black mark

(Deposition of Max Bliesath.)
against him, or if he were sick a day, would it spoil his chance of keeping his job?

A. Of course, if the man is sick, we don't want him on ship board. We don't want anyone who can not perform his duties.

Mr. LYNCH: The Government rests at this time. At this time we would like to renew our motion for directed verdict [97] on the ground that no evidence has been brought forth to show that Captain O'Brien was totally and permanently disabled at the time alleged and he is not even now permanently and totally disabled; on the further ground that the work records brought forth show that he has been continuously employed from the time previous to his alleged disability and for five or six years after his policy had lapsed.

The COURT: Same ruling.

Mr. LYNCH: May I have an exception?

The COURT: Yes.

Thereupon the jury retired and returned a verdict for plaintiff fixing the date of permanent and total disability as of June 30, 1927.

On September 26, 1933, the following stipulation and order was entered into by and between the parties hereto and filed under date of September 29,

after having been approved by the District Judge, before whom the case was tried:

> IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that the defendant may have to and including the 27th day of November, 1933, within which to prepare, file and serve its proposed bill of exceptions, and
>
> IT IS FURTHER STIPULATED AND AGREED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the July 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1933 term of said Court to the 16th day of December, 1933, thereof.

And thereafter on the 27th day of November, 1933, it was stipulated by and between the parties to the above-entitled action [98] that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of December, 1933, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so

as to include the November 1933 term of said court to the 16th day of January, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 27th day of November extending the term of the Court to and including the date set forth in the stipulation. This order was filed on November 27, 1933.

And thereafter on the 26th day of December, 1933, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of January, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the November 1933 term of said court to the 27th day of January, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 29th day of December, 1933, extending the term of the [99] court to and including the date set forth in the stipulation. This order was filed on December 29, 1933.

And thereafter on the 26th day of January, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of February, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 9th day of March, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback Judge of the above-entitled court and an order was made by the said Honorable Judge on the 27th day of January, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on January 27, 1934.

And thereafter on the 27th day of February, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of March, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the July 1933 term of the

above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 16th day of April, 1934, thereof. This stipulation was approved by the Honorable [100] Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 1st day of March, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on March 1, 1934.

And thereafter on the 27th day of March, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 27th day of April, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 17th day of May, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 27th day of March, 1934, extending the term of the court to and including the date set

forth in the stipulation. The order was filed on March 27, 1934.

And thereafter on the 24th day of April, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 11th day of May, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended [101] by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March, 1934, term of said court to the 21st day of May, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 25th day of April, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on April 25, 1934.

And thereafter on the 11th day of May, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 18th day of June, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case,

the July 1933 term of the above-entitled court, within which the judgment was entered and which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the March 1934 term of said court to the 7th day of June, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 11th day of May, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on March 27, 1934.

And thereafter on the 18th day of May, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of June, 1934, and it was further stipulated and agreed [102] that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the March 1934 term of said court to the 30th day of June, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 18th day of May, 1934, extending the term of the court to and

including the date set forth in the stipulation. The order was filed May 18, 1934.

And thereafter on the 18th day of June, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of July, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July 1934 term of said court to the 31st day of July, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 18th day of June, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on June 18, 1934.

And thereafter on the 17th day of July, 1934, it was stipulated by and between the parties to the above-entitled [103] action that for the purpose of preparing, filing and serving the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of August, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and

filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July 1934 term of said court to the 22nd day of August, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 17th day of July, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on July 17, 1934.

And thereafter on the 17th day of August, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, filing and serving the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of September, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July term of said court to the 30th day of September, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the

18th day of August, 1934, extending the term of [104] the court to and including the date set forth in the stipulation. The order was filed on August 18, 1934.

And thereafter on the 18th day of September, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, filing and serving the proposed amendments to the bill of exceptions in this case, plaintiff could have to and including the 18th day of October, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the July term of said court to the 21st day of October, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 19th day of September, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on September 19, 1934.

And thereafter on the 16th day of October, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing its engrossed bill of exceptions in this case, defendants could have to and

including the 18th day of November, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1934 term of said court to [105] the 8th day of December, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 18th day of October, 1934, extending the term of the court to and including the date set forth in the stipulation. The order was filed on October 18, 1934.

And thereafter on the 19th day of November, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing its engrossed bill of exceptions in this case, defendant could have to and including the 26th day of November, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the July 1933 term of the above-entitled court, within which the judgment therein was entered, and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1934 term of said court to the 17th

day of December, 1934, thereof. This stipulation was approved by the Honorable Frank H. Kerrigan, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 19th day of November extending the term of the Court to and including the date set forth in the stipulation. This order was filed on November 19, 1934.

And thereafter on the 7th day of December, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing plaintiff's amendments to the engrossed bill of exceptions in this case, plaintiff could have to and including the 17th day of December, 1934, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in this case, the [106] July 1933 term of the above-entitled court, within which the judgment therein was entered, and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the November 1934 term of said court to the 22nd day of December, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 7th day of December extending the term of the Court to and including the date set forth in the stipulation. This order was filed on December 7, 1934.

On December 7, 1934, the following stipulation and order was entered into by and between the parties hereto.

IT IS HEREBY STIUPLATED AND AGREED by and between the parties hereto, through their respective counsel, that the exhibits for each of the parties hereto, plaintiff and defendant, be forwarded by the Clerk of the above-entitled court, to the United States Circuit Court of Appeals for the Ninth Circuit, and that said exhibits shall be incorporated into by reference, and expressly by reference made and deemed to be a part of this Bill of Exceptions. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 7th day of December in accordance with this stipulation. This order was filed on December 7, 1934.

Dated: December 17, 1934.

ALVIN GERLACK,
Attorney for Plaintiff.

H. H. McPIKE,
United States Attorney
Attorney for Defendant. [107]

STIPULATION.

IT IS HEREBY STIPULATED by and between the above-entitled parties and their respective counsel that the foregoing Amended engrossed bill of exceptions is true and correct, and that the same

may be settled and allowed by the above-entitled court and made a part of the record in this case.

ALVIN GERLACK,
Attorney for Plaintiff.
H. H. McPIKE,
United States Attorney,
Attorney for Defendant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing engrossed bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said engrossed bill of exceptions may be used by either parties plaintiff or defendant upon any appeal taken by either parties plaintiff or defendant.

Dated: December 17, 1934.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Dec. 17, 1934. [108]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

The United States of America, defendant in the above entitled action, by and through H. H. McPike, United States Attorney for the Northern

District of California, feeling itself aggrieved by the judgment entered on the 16th day of September, 1933, in the above-entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit.

And in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for a directed verdict at the close of plaintiff's case, which motion was made on the ground that all of the evidence was not sufficient to support the allegation to the effect that plaintiff became permanently and totally disabled at any time between April 1, 1925, and July 2, 1927, and continued so permanently and totally disabled to the date of the filing of the complaint.

II.

The court erred in denying defendant's motion for a directed verdict at the close of the case on the ground that all of the evidence was not sufficient to support the allegation to the effect that plaintiff became permanently and totally disabled at any time between April 1, 1925, and July 2, 1927, and continued so permanently and totally disabled to the date of the filing of the complaint. [109]

WHEREFORE, defendant prays that its appeal be allowed that a transcript of the record of pro-

ceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that this assignment of errors be made a part of the record in its cause, and that upon hearing of its appeal, the errors complained of be corrected and the said judgment of September 16, 1933, may be reversed, annulled and held for naught; and further that it may be adjudged and decreed that the said defendant and appellant have the relief prayed for in its answer and such other relief as may be proper in the premises.

H. H. McPIKE,
United States Attorney,
Attorney for Defendant and Appellant.

Service of the within Petition by copy admitted this 15 day of December, 1933.

ALVIN GERLACK,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 16, 1933. [110]

[Title of Court and Cause]

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment

heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs or damages shall be required to be given or filed.

Dated: December 15, 1933.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Service of the within Order by copy admitted this 15 day of December, 1933.

ALVIN GERLACK,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 19, 1933. [111]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Amended Complaint.

3. Answer to Amended Complaint.
4. Judgment.
5. Petition for Appeal and Assignment of Errors.
6. Order Allowing Appeal.
7. Citation on Appeal.
8. Bill of Exceptions.
9. This Praecipe.

H. H. McPIKE,
United States Attorney
Attorney for Defendant.

[Endorsed]: Receipt of the within Praecipe by copy admitted this 20th day of December, 1934.

ALVIN GERLACK,
Attorney for Pltff.

[Endorsed]: Filed Dec. 27, 1934. [112]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 112 pages, numbered from 1 to 112 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing record is $20.30; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 30th day of January, 1935.

[Seal] WALTER B. MALING, Clerk,
By B. E. O'HARA,
Deputy Clerk. [113]

United States of America.—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To ROBERT CHESTER O'BRIEN, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein the United States of America is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback, United States District Judge for the Northern District of California this 5th day of January, A. D. 1934.

HAROLD LOUDERBACK,
United States District Judge.

Receipt of a copy of the citation is admitted this 6th day of January, 1934.

ALVIN GERLACK,

[Endorsed]: Filed Jan. 8, 1934. [114]

[Endorsed]: No. 7759. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Robert Chester O'Brien, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 30, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7718

United States Circuit Court of Appeals

For the Ninth Circuit.

OSCAR S. LUND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

DEC 27 1934

PAUL P. O'BRIEN,
Clerk

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OSCAR S. LUND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Defendant and Appellant:

AMES PETERSON, Esq.,

Black Building,

HENRY C. HUNTINGTON, Esq.,

American Bank Building,

Los Angeles, California.

For Plaintiff and Appellee:

PEIRSON M. HALL, Esq.,

United States Attorney,

J. J. IRWIN, Esq.,

Assistant United States Attorney

Federal Building

Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To United States of America and Peirson M. Hall as United States Attorney for the Southern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 17th day of August, A. D. 1934, pursuant to an order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause entitled United States of America plaintiff vs. Oscar S. Lund, defendant, No. 11768 H, and you are required to show cause, if any there be, why the judgment and sentence in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harry A. Hollzer, United States District Judge for the Southern District of California, this 19th day of July, A. D. 1934, and of the Independence of the United States, the one hundred and fifty nine.

Hollzer

U. S. District Judge for the Southern District of California.

[Endorsed]: Rec'd copy this citation this 20th day of July 1934. Also rec'd copies of Assignments of Error, Order allowing appeal and petition for same, order fixing bond, order for exam. of sureties. Ernest R. Utley Asst. U. S. Atty. Filed Jul. 20, 1934. R. S. Zimmerman, Clerk By L. J. Somers, Deputy Clerk.

No. 11768-H Filed......................

Viol: Section 32 Federal Penal Code (18 USC 76)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the second Monday of September in the year of our Lord one thousand nine hundred thirty-three:

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oath present:

That

OSCAR LUND,

hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 27th day of July, A. D. 1932, at San Pedro, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court did knowingly, wilfully, unlawfully and feloniously, and with intent to defraud certain persons, to-wit: Lawrence Davis and W. H. Davis, falsely assume and pretend to be an officer and employee of the United

States, acting under the authority of the United States, to-wit: a Federal Officer, and did then and there take upon himself to act as such officer in that he, the said defendant, served upon the said Lawrence Davis a purported search warrant and did search the premises of said Lawrence Davis located at 2322 South Grand Avenue, San Pedro, California, and did have in his possession and show to the said Lawrence Davis a badge bearing the letters "U S", when in truth and in fact, as he, the said defendant then and there well knew, he, the said defendant was not an agent and employee of the government of the United States and was not acting under the authority of the United States or any department thereof, and was not authorized by the United States, or any department thereof, to take upon himself to act as such officer and employee.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That OSCAR LUND, hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 27th day of July, 1932, at San Pedro, County of Los Angeles, state, division and

district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously demand and obtain from a certain person, to-wit: one Lawrence Davis, a valuable thing, to-wit: merchandise consisting of twenty gallons of intoxicating liquor, the said defendant then and there pretending to the said Lawrence Davis that he, the said defendant, was an officer and employee of the United States, acting under the authority of the United States, to-wit: a Federal Officer, when in truth and in fact, as he, the said defendant, then and there well knew, he, the said defendant, was not an officer and employee of the government of the United States and was not acting under the authority of the United States or any department thereof, and was not authorized by any department of the government of the United States to hold himself out as such officer and employee, or to demand or obtain from the said Lawrence Davis the said merchandise;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

PEIRSON M. HALL,
United States Attorney.

Wm. Fleet Palmer,
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 13, 1933. R. S. Zimmerman, R. S. Zimmerman, Clerk.

At a stated term, to wit: The September Term, A. D. 1933, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 22d day of January in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Harry A. Hollzer, District Judge.

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) No. 11,768-H,
vs.) Crim.
)
OSCAR LUND,)
)
Defendant)

This cause coming on for arraignment and plea of defendant Oscar Lund, who is present in custody of the City authorities; J. J. Irwin, Assistant U. S. Attorney, appearing for the Government; H. C. Huntington, Esq., appearing for the defendant:

Defendant waives reading of the charges, states his true name to be as given therein, and enters his plea of Not Guilty; whereupon, H. C. Huntington, Esq., moves to reduce bail to $2500, which motion is opposed by J. J. Irwin, Esq., and the cause is ordered continued for the Term for setting for trial. Later, at 2 o'clock p. m., defendant's motion to reduce bail is ordered denied without prejudice.

[TITLE OF COURT AND CAUSE.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant, Oscar Lund guilty as charged in the 1st count of the Indictment, and guilty as charged in the 2d count of the Indictment.

Los Angeles, California, June 6th, 1934.

C. E. Magenheimer,
Foreman of The Jury.

[Endorsed]: Filed Jun. 6, 1934. R. S. Zimmerman, Clerk, By M. R. Winchell, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Tuesday, the 10th day of July, in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

United States of America, Plaintiff,)
)
vs) No. 11768-H-Crim.
)
Oscar Lund, Defendant.)

This cause coming on for sentence of Oscar Lund, the defendant herein, who is present in custody; J. J. Irwin, Assistant U. S. Attorney, appearing for the Government; H. C. Huntington and Ames Peterson, Esqs., appearing for the defendant: A. Peterson, Esq., presents motion in arrest of judgment, which is ordered filed; a statement of facts is made by Agent Bott; and the Court now pronounces sentence upon the defendant for the crime of

which he stands convicted, viz: violation of Section 32 of the Federal Penal Code, and

Upon count one it is the judgment of the Court that the defendant be confined in the United States Penitentiary, McNeil Island, Wash., for the term of thirty (30) months; and with respect to count two, that the defendant be placed on probation for a period of five years, beginning with the date of defendant's release after serving sentence pronounced with respect to count one; and the term is extended for the period of probation.

The conditions of probation are that the defendant, in addition to obeying the laws of the land, shall refrain from handling narcotics, shall refrain from associating with persons known to deal in narcotics, and otherwise comply with such instructions as the Probation Officer may prescribe. It is ordered that this case be placed on the calendar of July 20th, 1934 for hearing on defendant's oral motion to set aside order allowing probation.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,	)	No. 11768-H
Plaintiff,	)	PROPOSED BILL OF
vs.	)	EXCEPTIONS OF
OSCAR S. LUND,	)	DEFENDANT OSCAR S.
Defendant.	)	LUND

BE IT REMEMBERED that an indictment was returned in the above entitled cause on the 13 day of December, 1933, and that thereafter, and on the 15th day of June, 1934, said cause came on regularly for trial on the issues raised by said indictment and the plea, not guilty thereto by the defendant, before the Honorable Harry A. Hollzer, judge presiding, sitting with a jury, the United States of America being represented by Assistant United States Attorney J. J. Irwin and the defendant being represented by his attorney Henry Huntington; and thereupon the following proceedings were had:

W. H. DAVIS:

Called as a witness on behalf of the Government, being first duly sworn, testified as follows:

I am a carpenter and reside in San Pedro. I don't remember ever having seen Oscar Lund before, (the de-

(Testimony of W. H. Davis)

fendant). Something unusual occu*re*d on the night of July 27, 1932. Two dark complexioned men, one about 6 feet 1 or 2 and the other perhaps 5 feet 10 or 11 came to a small room in back of our house. My son was in this small room, which was rented by a boot-legger at the time and my so*m* and I were driving for this man. My son is Lawrence Davis. When I entered the room, the first man that I met caught me by the shoulder and told me to sit down. I asked him what it was about. He pulled his coat open and presented something that looked like a badge and said, "sit down". I figu*e*red that I didn't have to sit down and the man pushed me down on the bed and talked to my son. There are two little rooms in this place. I started to get up to get to the other room. It was the shorter man that pushed me down on my bed. I started to talking to the tall man and ask him what it was all about and he told me that he was searching the place.

MR. IRWIN:

Appearing as counsel for the prosecution made the following statement:

Q. Did he tell you what the paper was?

A. He said, "This is all you want to see."

Q. Then, after you looked at it, you had a further conversation with him about that paper?

A. I asked to see it later on, again.

Q. You had a further conversation about it at that time?

MR. BOTT:

Agent for the Department of Justice being present, the following occurred.

(Testimony of Lawrence Davis)

THE COURT: Do you recognize Mr. Bott, the Government Agent, who is now sitting in the Court room?

WITNESS: Yes, sir. I had a conversation with him on or about August 2, 1932. He said he was connected with the Federal Government. He asked me what took place on the evening of July 27th. I went with him to the police station. I identified someone and told Mr. Bott I thought that person was the man. I identified him as being the shorter man. I have not seen that person whom I identified here today. The name of Lund was mentioned when I talked to Mr. Bott. I identified him as the man who grabbed hold of me that night. I have not seen either of the two men who are now present, before. That is to say I do not remember them. I remember talking to you (Mr. Irwin) on the 31st of May of this year. I did not tell you that Mr. Lund was the man who accosted me on the 27th of July. I did not tell you that I could identify Mr. Lund.

WHEREUPON the deposition of

LAWRENCE DAVIS

taken by stipulation was read into evidence: The said Lawrence Davis having been first duly sworn.

My name is Lawrence Davis and I was living at number 2322 South Grand Ave. in San Pedro, on the 27th of July, 1932. I saw Oscar Lund for the first time on that date. My father was with me. I drove into the alley and saw him in the back yard. He said, "you are the man that I want." I asked him what he wanted. He flashed a badge on me. It looked like a gold badge with a silver top and the letters "U. S." on top of it. He

(Testimony of W. H. Davis)

showed me a paper. I looked at it. He did not give it to me. He said that was the evidence and said that I had sold a couple of pints of liquor to a person named Hanson. He showed me this paper and said he was going to search the house. He did not search it. About that time my father came in and this conversation was in his presence. I think he showed my father the paper he had. I saw Mr. Lund again at the police station.

CROSS EXAMINATION

BY MR. HUNTINGTON:

The tall fellow had a gray suit on. The man that showed me a badge weighed about 175 or 180 pounds. He was dark, sort of tanned, just ordinary I guess. I think he had on a dark suit. I remember Mr. Lund from having seen him at the County Jail.

WHEREUPON the witness

W. H. DAVIS

was re-called to the witness stand.

WITNESS: There was an appointment made to meet these two gentlemen again. I was with the tall man. I don't remember telling Mr. Bott that I knew the name of either one of the men who accosted me. I did identify the smaller man at the jail afterward. That night when those people were at my place I said, "you fellows have the authority to search this place," and I told them that I was not going to run away, and one of them said, "you would not get very far if you did". I said to the tall man, "isn't there some way out of this"? And he said, "talk to the other man." So I called him to one side and asked him the same question and he gave me

(Testimony of W. H. Davis)
no satisfaction and so I went back to the tall man who asked me how much money I had. I told him I might be able to raise $100.00. He told me I would have to raise $500.00.

QUESTION BY THE COURT:

Did one of the men show you a badge?

WITNESS: Yes, he showed me a badge. I did not see the letters upon it. I remember telling the agent Bott that these persons said they were federal officers. That statement was made on July 27, 1932. It is a fact that on July 30th, I identified Mr. Lund as being one of the persons who called at my home but, it was not he with whom I engaged in conversation about the payment of money. It is a fact that Mr. Lund showed me a badge and stated that he and the man with him were federal officers. It is also a fact that on that occasion, that is to say, on July 27, 1932, those men took 20 gallons of liquor away from me. It is not true that Lund commanded his partner to take my son into an adjoining room. It is not true that Lund said to me that there were 4 of us or ask me how much money we had. I did tell however, one of the men, that I did not have any money but that I might rake up $50.00 in the morning. It is not true that I promised to give Lund any money. All of my conversation was with the tall man. Mr. Lund is not the man that I talked with concerning money. I don't know now whether it was Lund to whom I talked concerning money. At the time I gave my statement I had things twisted up. At the time I gave the statement I wasn't sure whether he was the man or not. It is true that one of the two men who were in my rear room

(Testimony of T. V. Rawson)

grabbed me by the shoulder, showed me a badge and stated that he and the man with him were federal officers. And one of them removed about 20 gallons of liquor to a car that was waiting in the alley. It is true that I said that I might be able to get the $50.00 in the morning and one of them said "what's $50.00 among 4 of us. You get $100.00 and I will call you and meet you alone the next day. I am not saying when". It is true that on July 30th, 1932, I pointed out the defendant, Lund, as being one of those men who were there. But it was not Lund that I had any conversation with concerning money.

CROSS EXAMINATION

I told the officer who interviewed me that I was a bootlegger but they did not arrest me. There were 5 or 6 officers present when I was interviewed. The officers showed me a picture of a man and said they did not know his name but they would go out and get him. I saw the badge that one of the men had on only once. I could not distinguish any writing upon it.

T. V. RAWSON,

being called as a witness on behalf of the Government, being first duly sworn, tesified as follows:

I am a police officer in the City of Los Angeles. I recall seeing the witness William H. Davis before. Davis and his son both identified the defendant, Lund as the man that came down to their place in San Pedro.

W. M. BOTT,

called as a witness on behalf of the Government and being first duly sworn, testified as follows:

I am a special agent of the United States Department of Justice, and I know the witness W. H. Davis. I had a conversation with him about the 1st day of August, 1932. He told me he wanted to make a conplaint. He told me that after the liquor was placed in the car in the alley that Mr. Lund told his partner to go into the adjoining room and that then Mr. Lund said to him "we don't do things this was, but owing to the fact that you have a mother and baby in the house, how much money have you got on you—how much money can you raise?" And that Davis said he could possibly raise $50.00 and that Lund told him he would have to raide $100.00. I had a conversation with the witness Davis on the 31st of May of this year and he told me that Oscar Lund was the man that came to his house. I also heard Mr. Davis state to Mr. Irwin, the Government prosecutor that Mr. Lund was the man who demanded money on the night of July 27, 1932.

R. A. SEARS,

called as a witness in behalf of the government and being first duly sworn, testified as follows:

That I am a police officer of the City of Los Angeles. I met the witness, Davis, the latter part of July, 1932. He complained to me about being high-jacked out of some liquor. I showed him a book with some pictures in it and he identified Lund as being the person who came to his

house. The witness Davis said that he was positive that Lund was the man who came to his house and represented himself as being a federal officer. The man identified by the witness, Davis is the defendant Lund, sitting here in the court room.

WHEREUPON counsel for the defendant Oscar Lund requested that the Court direct the jury to return a verdict in favor of said defendant, which motion was by the Court denied and an exception noted.

CLARA LUND,

being called as a witness on behalf of defendant and having been first duly sworn testified as follows:

I am the common law wife of Oscar Lund. I have lived with him for seven (7) years and I recall the night of July 27, 1932. My husband was home all day and he was home all evening, I am positive of that. He was arrested 2 or 3 days afterwards. I didn't see him the night he was arrested.

OSCAR LUND,

being called as a witness in his own behalf and having been duly sworn testified as follows:

The photograph which you showed me is my picture. I don't know when it was taken. When I was arrested I was booked on suspicion of robbery. I never saw Mr. W. H. Davis before. I did not visit a place in San Pedro, located on number 2322 South Grand Ave., on the 27th of July, 1932; nor did I visit any place on that evening in San Pedro; nor did I represent myself to be a federal officer at that time; nor did I exhibit a pur-

(Testimony of Oscar Lund)

ported search warrant; nor did I demand or obtain any money from anybody on that date; nor did I demand or obtain any intoxicating liquor from anyone. As a matter of fact I was home on the evening of July 27, 1932. I believe on the 27th of July, 1932 I was in jail. And on the 24th of July, 1932 I was in Malibu Beach. I think I was down there two weeks. I don't know what day I went down to Malibu Beach. I got back 4 or 5 days before I was arrested.

Whereupon the jury was instructed upon the law, relative to said cause by the court and there being no exception noted either by counsel for the Government or counsel for the defendant, the bailiff was sworn to take charge of the jury and the jury retired to deliberate, then 2:55 o'clock P. M.

Whereupon the following occurred:

THE COURT: Now that the jury has retired, and addressing ourselves to the witness W. H. Davis—Mr. Davis, will you come forward?

(Whereupon the witness W. H. Davis came forward as requested.)

THE COURT: The Court received a communication to the effect that you desired to make some statement. That communication came to us after the evidence had been concluded and the argument had been partially completed. Accordingly, the Court could not permit you to make your statement in the presence of the jury.

If you desire to make a statement at this time, that privilege will be accorded to you.

MR. DAVIS: I do.

THE COURT: Very well.

You understand, of course, that you are not obliged to make any statement, and that any statement made by you, if it should be in any way against your interest or in any was incriminating, or involving you in any way, of course, it is one you are not required to make, and if made, of course, could be used against you in any future proceedings.

With that admonition, should you still desire to make a statement, you may do so.

MR. DAVIS: I do, your Honor.

THE COURT: Very well.

MR. DAVIS: Do I need to take the stand?

THE COURT: No, you can make it from right there.

MR. DAVIS: Well, I wish to state that this being my first time on the witness stand, and in court, I didn't understand everything, that is, that went on in court, and when the questions were put to me, quite a few of the questions, I answered them as I figured that I should, in my own mind, and when Mr. Irwin asked me the questions in regard to talking to him and Mr. Bott out in the—well, out in the hallway, I guess as you call it—and I think the question he put to me was in this way: He asked me, he said that in refreshing my mind, that he and Mr. Bott asked me if the man inside the court room was the man, Mr. Lund. That question—the reason I answered it as I did, I didn't remember the question being put to me in that exact form. I thought they asked me the question if I could identify the man, Mr. Lund, in this case.

And when I took the stand to identify him, I was asked the question if I could identify this Mr. Lund, in this case. Although the man may be Mr. Lund—I want to make it clear to the Court, simply this: This man may be Mr. Lund, but that I wasn't positive in my identification only. He didn't seem to look like the man that held us up at the time. That was the only thing that I—only conclusion that I had. It may be the man, but I wasn't positive that it was the man, because he simply didn't look like the man that held me up that night, because the man that held me up that night was a man quite a lot heavier than this man, also a man that had—I am not certain, but quite sure—glasses on, and a hat on at the time.

Of course, I picked this man's picture out at the police station as being the man that looked like the man that held me up. The books were laid open. The police officers made a statement that the books were handed to us and we were told to go through them and look through them. That, as I remember, is incorrect. The books were laid down, three books, as I remember it and opened up. And at that time one of the officers pointed to a certain picture in one of these books—I don't remember the officer—and says, "Does that look like the man?" And I said, "Yes, it does."

We went through the rest of the books, looked through two or three of the books, to see if there was anything else that looked like the man. There was no other picture that looked as much like the man that held us up as this one that we had picked out that had been shown to us.

We went up in the shadow box there, and a man was marched, with three or four other men, into the shadow box. And he corresponded to the picture we had picked out and looked like the man that held us up.

I didn't want to commit myself that that positively was the man. He looked like the man, and I don't remember of making the statement at any time during the entire discoursement of the case as being positive that that man was the man, but he looked like the man that held us up.

And that is the reason that I spoke as I did when asked that question by Mr. Irwin in regard to this Mr. Lund being the man. I wasn't sure of it. He looked like the man.

THE COURT: Who looked like the man?

MR. DAVIS: This man sitting right here.

THE COURT: You mean Mr. Lund, the defendant?

Mr. Davis: Yes.

THE COURT: Was there something you wanted to add?

MR. DAVIS: Well, there is only one thing that I may add. My wife is here in the court room, and I have been talking to her since she come up here.

I asked her at the time we were talking if this gentleman that they called Oscar Lund, if she thought he was the man that held us up, because my wife was present all the time in this room. She was marched in there by one of the men.

MR. IRWIN (Interrupting): I wonder if the witness Davis would care to be put under oath while making this statement?

THE COURT: No, let him continue making the statement.

MR. DAVIS: I talked to her and she said, "I want you home and you must tell the truth."

"Well," I said, "you under the same circumstances would tell the truth."

"Now," I asked her, "did you see any one in the court room that looked like the man that held us up?"

"No," she said, "I didn't."

"Well," I said, "if you was to take the stand could you identify the man in the courtroom called Oscar Lund as being the man that held us up?"

She said, "No, I couldn't because the man that held us up was quite a lot larger tha*t* that man." "And if I remember right," she said, "I think he wore a brown suit, a panama hat and had glasses on."

"Well, then," I said, "under the same circumstances that I am placed under I answered the same as you would, it looked like the man, but I am not positive that he is the man."

And my wife saw the man, this man especially, more than I did, because she sat on the bed during the entire proceedings of this case while I was back and forth in the rooms.

THE COURT: Does that conclude the statement you wish to make?

MR. DAVIS: Well, I am told I am held here to— to be held under perjury. I don't understand this perjury. I have never had that experience. This is my

first time on the witness stand in my life, and I don't understand how it is that I am held on perjury after trying to be honest with every one concerned. And I wish to have that made clear to me.

If I have done anything that isn't in accordance with the Court, and being dishonest, I wish to try and remedy it. I have no desire to do so.

THE COURT: Do we understand that some charge has been filed against this man?

MR. IRWIN: It has already been filed. I understand that when the witness leaves the courtroom he will be served with a warrant in connection with the existing complaint which has been presented to the Grand Jury, but will probably be returned, and in the meanwhile a Commissioner's complaint has been sworn to, and bond has been fixed, so I think at this time I can move your Honor to rescind the order of detention of that witness as a material witness.

THE COURT: Yes. The evidence having been concluded the order of detention of Mr. W. H. Davis as a witness is vacated.

MR. HUNTINGTON: May I address the Court? I was wondering, Your Honor, in view of that statement, if it would not be in order that I move the court to declare a mistrial in this case.

THE COURT: A mistrial on what ground?

MR. HUNTINGTON: On the ground of the misunderstanding of the witness of certain questions; on the

ground that his testimony obviously puts me at a terrible disadvantage. The entire conduct of the witness was such that I couldn't comment on his evidence very strongly. And that there are new matters, by way of evidence, that has appeared here that, of course, has taken the defendant entirely by surprise, the intimation of the additional witness present.

And I believe in all fairness that the jury should be informed of that fact.

THE COURT: Well, it would seem to us that that is a matter in which the Government has suffered and not the defendant. But at best it wouldn't be any ground for a mistrial.

Do I understand you are now making a motion for a mistrial?

MR. HUNTINGTON: Yes, I have made that in the form of a motion.

THE COURT: THat motion is denied.

MR. HUNTINGTON: Exception, please.

WHEREUPON, the last quoted testimony was not read to the jury and thereafter the jury returned with a verdict of guilty on both counts.

THEREAFTER, and upon the 10th day of July, 1934, and before the pronouncement of judgment by the Court on said defendant, the following motion in arrest of judgment was filed:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) No. 11768-H Criminal.
OSCAR S. LUND,) MOTION
Defendant.)

Comes now the above named defendant and moves the Court in arrest of the judgment this date pronounced in the above entitled cause, upon the ground and for the reason that said Court was without jurisdiction or power to sentence said defendant to any term in excess of three (3) years because the evidence conclusively shows but one offense was committed; that the offense charged in each count of the indictment is identical; and that there *was* been an attempt made to carve two offenses out of the same state of facts.

DATED: July 10th, 1934.

AMES PETERSON
Attorney for Defendant.

Which said motion was thereafter by the Court denied and an exception allowed to the defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

UNITED STATES OF AMERICA,	)	NO. 11,768-H Criminal
Plaintiff,	)	ORDER EXTENDING TIME FOR FILING PROPOSED BILL OF EXCEPTIONS
vs.	)	
OSCAR S. LUND,	)	
Defendant.	)	

Good cause appearing therefor, it is stipulated between the undersigned that the time for filing the proposed bill of exceptions by the defendant and appellant in the above entitled cause be, and the same is hereby, extended to and including AUGUST 20th, 1934.

DATED: July 19th, 1934.

PEIRSON M. HALL,
United States Attorney

By J. J. Irwin
Assistant United States Attorney

AMES PETERSON
Ames Peterson
Attorney for Defendant and Appellant.

IT IS SO ORDERED

Hollzer
Judge.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

UNITED STATES OF AMERICA,	)	No. 11768-H Criminal
Plaintiff,	)	ORDER EXTENDING TIME FOR FILING PROPOSED BILL OF EXCEPTIONS and ORDER.
vs.	)	
OSCAR S. LUND,	)	
Defendant.	)	

Good cause appearing therefor, it is stipulated between the undersigned that the time for filing the proposed bill of exceptions by the defendant and appellant in the above entitled cause be, and the same is hereby, extended to and including the 20th day of September, 1934.

DATED: AUGUST 8th, 1934.

It is further ordered that the term of court be extended to that date.

PEIRSON M. HALL,
United States Attorney
By Ernest R. Utley
Assistant United States Attorney
AMES PETERSON
AMES PETERSON,
Attorney for Defendant and Appellant.

IT IS SO ORDERED.
Hollzer
JUDGE

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	STIPULATION AND ORDER
OSCAR S. LUND,	)	
Defendant.	)	

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant Oscar S. Lund, by and through their respective counsel, that the time in which to serve and file a Bill of Exceptions on appeal in the above entitled cause may be extended to the 25th day of October, 1934.

DATED this 15th day of September, 1934.

PIERSON M. HALL
United States Attorney
J. J. Irwin
Assistant U. S. Attorney
AMES PETERSON
Ames Peterson
Attorney for Defendant Oscar S. Lund.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which the Bill of Exceptions in the above entitled cause may be filed and settled be, and the same is hereby extended to the 25th day of October, 1934, and the term of court is extended also to that date.

DATED this 15th day of September, 1934.

Hollzer
United States District Judge

UNITED STATES OF AMERICA,	)	
	)	No. 11768-H
Plaintiff,	)	Criminal
	)	STIPULATION
vs.	)	AND ORDER
	)	
OSCAR S. LUND,	)	
Defendant.	)	

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant OSCAR S. LUND, by and through their respective counsel, that the time in which to serve and file a Bill of Exceptions on appeal in the above entitled cause may be extended to the 25th day of November, 1934.

DATED this 12th day of October, 1934.

PIERSON M. HALL
United States Attorney
By J. J. Irwin
Assistant U. S. Attorney
AMES PETERSON
Ames Peterson
Attorney for Defendant OSCAR S. LUND.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which the Bill of Exceptions in the above entitled cause may be filed and settled be, and the same is hereby extended to the 25th day of November, 1934, and the term of court is extended also to that date.

DATED this 12th day of October, 1934.

Hollzer
United States District Judge

UNITED STATES OF AMERICA, Plaintiff	)	No. 11768-H
vs.	)	Criminal
OSCAR S. LUND, Defendant	)	STIPULATION AND ORDER

IT IS HEREBY STIPULATED by and between the plaintiff and the defendant, OSCAR S. LUND, by and through their respective counsel, that the time in which to serve and file a Bill of Exceptions on appeal in the above entitled cause may be extended to the 15th day of December, 1934.

Dated this 15th day of November, 1934.

Pierson M. Hall,
United States Attorney
By J. J. Irwin
Assistant U. S. Attorney.
AMES PETERSON
Ames Peterson
Attorney for Defendant OSCAR S. LUND.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the time within which the Bill of Exceptions in the above entitled cause may be filed and settled be, and the same is hereby extended to the 15th day of December, 1934, and the term of court is extended also to that date.

Dated this 15th day of November, 1934.

Hollzer
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 11768-H Criminal
vs.	)	STIPULATION and ORDER
OSCAR S. LUND, Defendant.	)	

IT IS HEREBY STIPULATED by and between the plaintiff and defendant, by and through their respective counsel, that the time within which defendant is to file the record and docket in the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit may be extended to and including the 24th day of December, 1934.

DATED: December 10th, 1934.

PIERSON M. HALL
United States Attorney.

By..................................
Assistant United States Attorney

AMES PETERSON
Ames Peterson,
Attorney for Defendant and Appellant.

Good cause appearing therefor, IT IS HEREBY ORDERED that the time within which the defendant is to file the record and docket in the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 24th day of December, 1934.

DATED: This ...... day of December, 1934.

....

United States District Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee vs. OSCAR S. LUND, Defendant and Appellant	No. 11768-H STIPULATION

IT IS STIPULATED by and between the counsel for the appellee and counsel for the appellant that the foregoing proposed bill of exceptions contains the correct statement of the evidence at said trial and of the orders incorporated in said bill, and that the same may be settled, allowed, and approved as constituting the bill of exceptions in this cause.

DATED: December 11th, 1934.

PIERSON M. HALL,
United States Attorney,

By J. J. Irwin
Assistant United States Attorney

Ames Peterson
Ames Peterson
Attorney for Defendant and Appellant.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 11768-H
	)	
Plaintiff and Appellee	)	ORDER
	)	ALLOWING,
vs.	)	SETTLING AND
	)	APPROVING BILL
OSCAR S. LUND,	)	OF EXCEPTIONS.
	)	
Defendant and Appellant	)	

THE FOREGOING BILL OF EXCEPTIONS is settled, allowed, and approved as the Bill of Exceptions in said cause, and it is hereby certified that said Bill has been presented, signed and filed within the time and term prescribed by law.

DATED: December 11th, 1934.

Hollzer
Judge

[Endorsed]: Filed Dec 12 1934 R. S. Zimmerman, Clerk By Thomas Madden Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

UNITED STATES OF AMERICA, Plaintiff,)	No. 11,768-H Criminal.
vs.)	PETITION FOR APPEAL AND FOR ORDER FIXING AMOUNT OF BOND.
OSCAR S. LUND, Defendant.)	

Comes now OSCAR S. LUND, and feeling himself aggrieved by the final decree and judgment of the court entered on the 10 day of July, A. D., 1934, hereby prays that an appeal may be allowed to him from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and, in connection with this petition, that an appeal may be allowed to him from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and, in connection with this petition, petitioner herewith presents his assignment of errors.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by

the order allowing this appeal, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Ames Peterson

Attorney for Appellant OSCAR S. LUND.

[Endorsed]: Filed Jul. 19, 1934. R. S. Zimmerman, Clerk By Louis J. Somers, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS.

Comes now the appellant, OSCAR S. LUND, and in connection with his appeal in this proceeding, says that, in the record, proceedings, and the final judgment therein, manifest error has intervened, to the prejudice of the appellant, to-wit:

I.

That the Court erred in permitting additional evidence or statements of the witness W. H. DAVIS after said cause had been submitted to the jury and before the jury had returned its verdict.

II.

That the Court erred in permitting the attempted impeachment of the witness W. H. DAVIS by Government Counsel.

III.

That the Court erred in permitting to be allowed in evidence statements of the witness W. H. DAVIS made outside of the presence of the defendant.

IV.

That the Court erred in permitting Government Counsel to examine the witness W. H. DAVIS relative to that certain written statement marked in this cause as "Government's Exhibit No. 2" for identification.

DATED: July 16th, 1934.

Ames Peterson
Henry Huntington
Attorneys for Defendant OSCAR S. LUND.

[Endorsed]: Filed Jul. 19, 1934. R. S. Zimmerman Clerk By Louis J. Somers Deputy Clerk.

[Title of Court and Cause.]

AMENDMENT TO ASSIGNMENT OF ERRORS

COMES NOW the above named appellant and with leave of Court first had and obtained, files this, an amendment to the Assignment of Errors, heretofore filed, and states that the Court erred to his prejudice in denying his Motion in arrest of judgment by imposing sentence upon the second count, by reason of the fact that there is but one offense set forth in said indictment and that the evidence introduced tended to prove the commission of but one offense.

DATED: December 11th, 1934.

Ames Peterson
Attorney for Appellant.

[Endorsed]: Filed Dec. 11, 1934 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF APPEAL BOND.

Appeal to the United States Circuit Court of *Appeal* for the Ninth Circuit is allowed, and petition for appeal approved, upon giving of bond as required by law, in the sum of SEVENTY-FIVE HUNDRED ($7500.00) DOLLARS.

DATED: July 17, 1934.

Hollzer
Judge of said court.

[Endorsed]: Filed Jul. 19, 1934 R. S. Zimmerman, Clerk By Louis J. Somers, Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE.

To R. S. ZIMMERMAN, CLERK OF THE ABOVE ENTITLED COURT:

Sir:

Please issue and certify for the defendant, OSCAR S. LUND, in the above entitled cause, as appellant upon appeal to the United States Court of *Appeal* for the Ninth Judicial District of the United States of America, a transcript of the record of the above entitled cause, and include therein the following:

1. Indictment.
2. Plea of the defendant thereto.
3. Bill of Exceptions.
4. Petition for Appeal.
5. Order allowing appeal and fixing bond.
6. Citation.
7. The stipulations on preparation and docketing the record on appeal.
8. Assignments of Errors and amendment thereto.
9. The verdict.
10. The sentence and judgment.
11. This praecipe.

Dated December 11th 1934

Ames Peterson
Attorney for Defendant and Appellant.

[Endorsed]: Received copy of the within this 15th day of December, 1934. Peirson M. Hall, D. H. attorney for plff. Filed Dec. 15 1934 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 39 pages, numbered from 1 to 39 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; indictment; minute order of January 22, 1934 entering plea of not guilty; verdict; sentence; bill of exceptions; petition for appeal; assignment of errors; amendment to assignment of errors; order allowing appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to .... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this .... day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,

Clerk of the District Court of United States of America, in and for the Southern District of California.

By

Deputy.

No. 7718.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

United States of America,
Appellant,

vs.

Oscar S. Lund,
Appellee.

APPELLANT'S BRIEF.

Ames Peterson,
Black Building, 4th and Hill Sts., Los Angeles,
Attorney for Appellant.

FILED

Parker, Stone & Baird Co., Law Printers, Los Angeles.

MAR 20 1935

PAUL P. O'BRIEN,

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No. 7718.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

United States of America, *Appellant,*	
vs.	
Oscar S. Lund, *Appellee.*	

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from a judgment of conviction, the charge being that the defendant violated the provisions of Section 32, Federal Penal Code. The indictment was filed December 13, 1933, in the Southern District of California and contained two counts. In the first count it was charged that the defendant Lund on July 27, 1932, at San Pedro, knowingly, wilfully, unlawfully and feloniously and with intent to defraud one Lawrence Davis and W. H. Davis, falsely assumed and pretended to be an officer and employee of the United States, act-

ing under the authority of the United States, when as the defendant well knew, he was not an agent and employee of the Government of the United States, nor was he acting under the authority of the United States.

The second count charged that on the same date at the same place, the defendant knowingly, wilfully, unlawfully and feloniously demanded and obtained from one Lawrence Davis, merchandise consisting of twenty gallons of intoxicating liquor by pretending to the said Davis that he was an officer and employee of the United States, acting under the authority of the United States; when in truth, and in fact, he well knew that he was not such an officer.

The defendant was convicted upon both counts, and upon the first count was sentenced to two and one-half years imprisonment at McNeil's Island, and upon the second count was placed upon probation for five years.

STATEMENT OF POINTS ON APPEAL.

There are but two points raised on this appeal. The first point is that the court erred in the taking of testimony out of the presence of the jury, and in not recalling the jury to hear this testimony.

The second point is that the court erred in pronouncing judgment upon the second count, for the reason that the offense charged in the second count is a component part of and necessarily included in the offense charged in the first count.

STATEMENT OF FACTS.

It appeared from the evidence [Tr. p. 11] that on the night of July 27, 1932, at San Pedro, two men entered a small house where W. H. Davis and his son, Lawrence Davis, were standing, and where apparently they had a supply of illicit liquor, and exhibiting a badge, and a piece of paper, stated that they had evidence that Lawrence Davis had sold two pints of liquor, and stated that they were going to search the house. [Tr. p. 13.] The demand was made for money by the two men, but apparently a compromise was entered into by the two men taking away twenty gallons of liquor which they found on the premises and no money was paid. At the trial the younger Davis identified the defendant Lund as being one of the two men. W. H. Davis did not so identify him. [Tr. p. 12.] Counsel for the Government claimed he was taken by surprise when the elder Davis failed to identify the defendant Lund, and was allowed to impeach him by showing he had identified Lund as one of the men present on the night in question on previous occasions.

After the jury had retired but before it had reached a verdict, the court asked the witness W. H. Davis to come forward, and stated to the said witness that he, the court, was advised that the witness desired to make

a further statement, the court using the following language:

> "The Court: The court received a communication to the effect that you desired to make some statement. That communication came to us after the evidence had been concluded and the argument had been partially completed. Accordingly, the Court could not permit you to make your statement in the presence of the jury.
>
> If you desire to make a statement at this time, that privilege will be accorded to you."

The witness then proceeded to make a statement in the absence of the jury, which statement appears on pages 19 to 23 of the transcript, and which need not be here again set forth, but the effect of which was to further modify and change previous testimony he had given in the case. The court received this further statement whereupon the counsel who conducted the trial (but who is not the counsel now appearing on appeal), requested the court to grant him a mistrial, which was denied.

The appellant feels that the testimony contained in the statement which the witness Davis gave in court should have been permitted to go to the jury. The witness Davis was still under oath, and in our opinion, was still giving testimony which the jury was entitled to hear. The testimony for the prosecution and that for the defense was in direct conflict.

The defendant Lund took the stand and flatly denied being present in San Pedro at all upon the occasion in question. The evidence was in direct conflict and any competent testimony which might have thrown light upon whether the defendant Lund was actually present or not, should have been permitted to be considered by the jury.

We have found no Federal cases dealing with this situation. There is, however, the case of *Elkins v. Commonwealth,* a Kentucky case, reported in *53 S. W. 2nd, at page 358.* In that case the defendant was convicted of giving away liquor. A prosecution witness testified as to the giving of the liquor by the defendant to him. While the jury was out and deliberating upon a verdict, the defendant talked to two people who told him that the prosecuting witness testified as he did because he had been paid a dollar to do so. Defendant moved to recall the jury in order to put the prosecution witness back on the stand to interrogate him about this matter and, if he denied it, to put the two new witnesses on the stand to impeach his testimony. This was denied and the jury brought in a verdict of guilty and upon appeal the case was set aside because of the fact that the defendant was not permitted to pursue this course.

It is the law in this state that a trial is not concluded until the verdict of the jury is reached. (*People v. Stewart,* 64 Cal. p. 60.) That being the case, there is no escape from the fact that testimony was given in the absence of a jury, and it would seem that this is not a practice to be followed.

The Court Was Without Jurisdiction to Impose Any Sentence Upon the Second Count.

Probably the leading case is that of *ex parte Nielsen,* 131 U. S. 176, a case with which this court is no doubt familiar, which held that where there were two indictments, and the acts charged in the second indictment were included in the acts charged in the first indictment, that there could be a conviction only in the case of one indictment, to the same effect as the case of *Goetz v. U. S.,* 39 Fed. (2d) 903. This was a fifth circuit case.

In *Cain v. United States,* 19 Fed (2d) 472 (C. C. A. 8th), the indictment was in two counts, one charging the unlawful sale of morphine, the other the unlawful sending of morphine through the mail. The evidence showed a sale by the defendant and a delivery by mail. On appeal, the court held that but one offense had been committed and that a delivery is a necessary element of a sale, and that inasmuch as the delivery was necessarily "included in the sale," a sentence on both counts constituted double jeopardy.

In *Miller v. United States,* 300 Fed. 529, 534 (C. C. A. 6th), it was held that on a charge of sale and possession of intoxicating liquor where the only possession was that shown by the act of sale, the offense of possession was necessarily included in and merged in the offense of sale. See also:

People v. Painetti, 80 Cal. Dec. 21;

United States v. Buckner, 37 Fed. (2d) 378;

Brady v. United States, 24 Fed. (2d) 399;
United States v. Weiss, 293 Fed. 992;
Murphy v. United States, 285 Fed. 801;
Braden v. United States, 270 Fed. 441;
16 *Corpus Juris,* 264.

We think it is perfectly clear from the statement of facts previously outlined above, that even if the jury were justified in convicting the defendant under one count, it must be plain that the evidence necessary to establish one count established the other, and it is respectfully urged that for the error of receiving testimony in the absence of the jury, and the error of imposing judgment upon the second count, that this cause should be reversed and a new trial had.

Respectfully submitted,

AMES PETERSON,
Attorney for Appellant.

No. 7718

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSCAR S. LUND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

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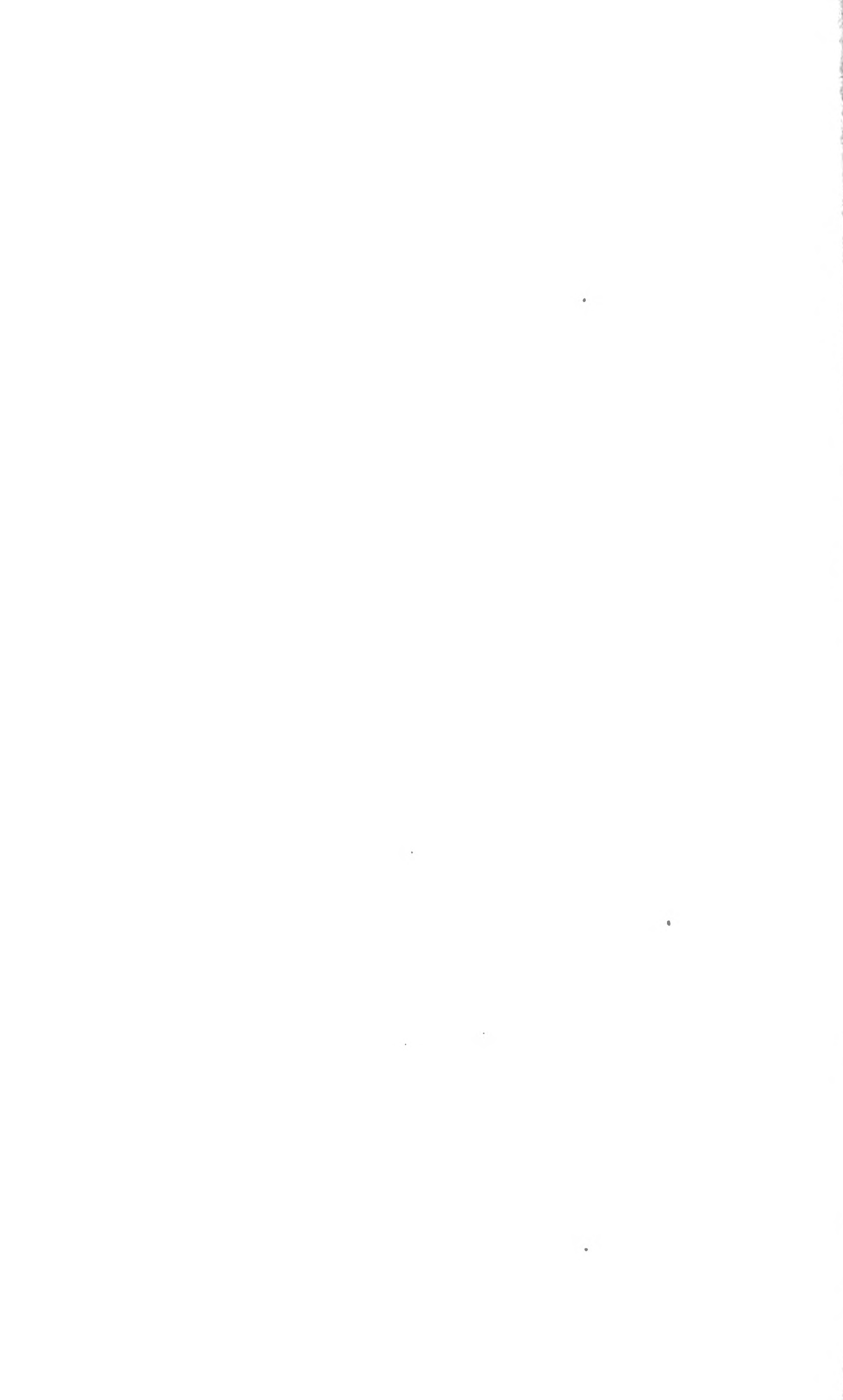

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSCAR S. LUND,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

Statement of the Case

The appellant stands convicted and sentenced on two counts charging violation of the provisions of Section 76, Title 18, *U.S.C.A.* (*Crim. Code,* Sec. 32.) The section provides:

> "*Falsely pretending to be United States Officer.* Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper,

> document, or other valuable thing, shall be fined not more than $1000, or imprisoned not more than three years, or both."

The reply brief of appellee will treat separately the principal grounds urged by the appellant in support of his appeal.

I.

Reply to Appellant's Argument That the Court Erred in the Taking of Testimony Out of the Presence of the Jury and in Not Recalling the Jury to Hear This Testimony.

(A) No Testimony Was Taken

(1) An examination of the transcript (Tr. p. 18) discloses the fact that the court received a communication that the witness Davis desired to make a *statement.*

It is true that word of the witness' desire to make such a statement came to the court after the arguments had been partially completed, before the case was given to the jury. We take issue with the appellant's contention that the statement which followed, as recorded in the record (Tr. pp. 19-23) was in any sense testimony, but on the contrary, distinctly shows was a statement not made under oath. This is borne out by the following quotations from the transcript. After Mr. Davis had made an extended statement (Tr. pp. 19-21), the following interruption was made by Mr. Irwin representing the Government:

> "I wonder if the witness Davis would care to be put under oath while making this statement?"

to which the court replied:

> "No, let him continue making the statement."

(2) The purpose of the statement by Davis was to avoid prosecution for perjury.

Examination of the transcript shows that at the conclusion of Davis' statement, the said Davis indicated that his purpose in addressing the court was not to seek to change his testimony but an effort to escape the consequences of his testimony. It was, in effect, a plea for the court's mercy. (Tr. p. 22.)

> "The Court: Does that conclude the statement you wish to make?
>
> Mr. Davis: Well, I am told I am held here to— to be held under perjury. I don't understand this perjury. I have never had that experience. This is my first time on the witness stand in my life, and I don't understand how it is that I am held on perjury after trying to be honest with every one concerned. And I wish to have that made clear to me.
>
> If I have done anything that isn't in accordance with the Court, and being dishonest, I wish to try and remedy it. I have no desire to do so."

Then in response to a question by the court, Mr. Irwin, representing the Government, stated (Tr. p. 23):

> "It has already been filed. I understand that when the witness leaves the courtroom he will be served with a warrant in connection with the existing complaint which has been presented to the Grand Jury, but will probably be returned, and in the meanwhile a Commissioner's complaint has been sworn to, and

bond has been fixed, so I think at this time I can move your Honor to rescind the order of detention of that witness as a material witness."

(B) No Motion Was Made to Recall the Jury

Assuming but in no way conceding that the statement of the witness Davis, before alluded to, was testimony, no motion was made by defendant's counsel to recall the jury. Such a motion was made in the case of *Elkins v. Commonwealth*, 53 S. W. (2d) 358 (cited by appellant), who asked for the recall of the jury in order that further testimony might be presented showing the financial interest of the chief prosecuting witness. The testimony there sought to be introduced were statements by the prosecuting witness in the hall outside the courtroom, after the jury had retired, to the effect that he had been compensated for his testimony. That motion was denied and the Kentucky court reversed it on that ground.

Accepting the statement of appellant that the law in this state is that a trial is not concluded until the verdict of the jury is reached and again assuming that the witness Davis' statement was testimony, defendant's remedy was by motion to recall the jury and not a motion for a mistrial. The record discloses that the only motion urged by defendant's counsel at the conclusion of Davis' statement was a motion for a mistrial. (Tr. pp. 23-34.)

II.

Reply to Appellant's Argument That the Court Was Without Jurisdiction to Impose Any Sentence Upon the Second Count.

(A) It is contended that the court erred in denying defense motion for arrest of judgment.

> "Comes now the above named defendant and moves the Court in arrest of the judgment this date pronounced in the above entitled cause, upon the ground and for the reason that said Court was without jurisdiction or power to sentence said defendant to any term in excess of three (3) years because the evidence conclusively shows but one offense was committed; that the offense charged in each count of the indictment is identical; and that there *was* been an attempt made to carve two offenses out of the same state of facts.
>
> DATED: July 10th, 1934.
>
> AMES PETERSON
> Attorney for Defendant."

Said motion was thereafter denied by the court and exception allowed to the defendant. (Tr. p. 25.)

1. Motion in arrest of judgment reaches only errors on the face of the record which would render the judgment erroneous if entered. Evidence is no part of the record for this purpose (Vol. 5, Cyc. of Fed. Proc., Sec. 2432, p. 759). In *Demolli v. United States*, 8th Circuit case, decided March, 1906, reported in 144 Fed. 363, at page 366, the above-mentioned proposition of law is supported, to-wit: the judgment can be arrested only for matter appearing on the face of the record and

the evidence is no part of the record for this purpose. The same proposition is supported in 251 Fed. 932 and 222 Fed. 444. Both of these cases are district court decisions.

2. It is urged that no defects or errors appear on the face of the record for the indictment charges two distinct offenses, both under Section 32, *Federal Penal Code* (18 U.S.C. 76) (Tr. 3-5). The first count charges the defendant with intent to defraud certain persons by falsely assuming to be an officer and employee of the United States by showing a false search warrant and badge bearing the letters "U. S." Count two, on the other hand, charges the defendant, on the same date, with unlawfully demanding and obtaining from one Lawrence Davis a valuable thing, to-wit: merchandise consisting of twenty gallons of intoxicating liquor.

It has been many times held that Section 32 *Federal Penal Code* (Title 18, *U.S.C.A.* 76), defines two offenses: (a) the first being the false impersonation of an officer or employee of the United States and acting to defraud the United States or some person, and (b), falsely impersonating an officer or employee and demanding or obtaining money or valuable thing, with intent to defraud. (*United States v. Rush*, 196 Fed. 579.)

It is held in *Lamar v. United States*, 241 U. S. 102, that when rightfully construed the operation of the first clause of the section is to prohibit and punish the falsely assuming or pretending with intent to defraud the United States or any person, to be an officer or employee of the United States as defined in the clause and the doing in the falsely assumed character any overt act whether it

would have been legally authorized and the assumed capacity existed or not, to carry out the fraudulent intent. This is all that was alleged in the first count of the indictment here in issue, namely, the defendant was charged with attempting to defraud Lawrence and W. H. Davis, as more particularly set forth in the indictment, and in pursuance of such intent he was charged with having committed the overt acts of serving upon Lawrence Davis a purported search warrant and then searching the premises of said Davis, and in addition with having in his possession and showing to the said Lawrence Davis a badge bearing the letters "U.S."

The second crime denounced by Section 32 of the *Federal Penal Code* is the falsely assuming or pretending to be an officer or employee acting under the authority of the United States, and in such pretended character demanding or obtaining any money, paper, document or other valuable thing, at which time the offense is complete. In *United States v. Barrow*, 239 U. S. 74, it is pointed out that the aim of the Section is not merely the protection of innocent persons from actual loss through reliance upon false assumption of federal authority but to maintain the general good repute and dignity of the service itself. It is further pointed out that it is inconsistent with this object, as well as the letter of the statute, to make determinative the question whether one who has parted with his property upon the strength of the fraudulent representation of federal employment has received an adequate quid pro quo in value.

This is what is charged in the second count of the indictment, namely: that the defendant while falsely pre-

tending to Lawrence Davis that he was an officer and employee of the United States, did unlawfully demand and obtain from the said Davis a valuable thing, to-wit: merchandise consisting of twenty gallons of intoxicating liquor.

Therefore, it would appear indisputably that the indictment charges two separate and distinct offenses; and that the face of the record is without error. Therefore, the honorable district court correctly ruled in denying defendant's motion for arrest of judgment hereinbefore referred to.

3. Assuming, but in no way conceding, that the whole transcript of the record including the evidence may be considered in reviewing an order denying a motion in arrest of judgment, the evidence abundantly sustains both counts.

Witness Lawrence Davis testified that he saw the defendant on the date charged in the indictment in the rear of his home; that at that time defendant flashed a badge on him which had the letters "U. S." on the face of it and he showed him a paper and said he was going to search his house. (Tr. 12-13.) This evidence alone we respectfully submit sustains the allegations in count one of the indictment.

The witness W. H. Davis testified that one of the men removed twenty gallons of liquor to a car which was waiting in the alley (Tr. p. 15).

Mr. Bott of the Department of Justice, after proper foundation had been laid showing that the witness W. H. Davis had taken the government by surprise, testified that the said W. H. Davis told him that "after the liquor

was placed in the car in the alley, Mr. Lund told his partner to go into the adjoining room and that then Mr. Lund said to him, 'we don't do things this way, owing to the fact that you have a mother and baby. How much money have you got on you?'" (Tr. p. 16.) The above quoted testimony we submit supports the allegations that the defendant Oscar Lund obtained something of value as charged in the indictment on the date in question, to-wit: twenty gallons of intoxicating liquor.

We respectfully repeat that even assuming that the evidence may be reviewed in considering the correctness of the lower court's order the evidence supports both counts of the indictment.

We turn now to a consideration and examination of appellant's references cited in support of his contention. They were reversed because the courts held in each instance that the various counts upon which separate sentences had been imposed relied on the same evidence, and there was no independent evidence to support the respective counts. It is further observed in connection with appellant's references that not one of them involved the question here argued, to-wit: the ruling of the court below in denying defendant's motion in arrest of judgment.

III.

Conclusion

There is no showing of harmfulness or prejudice to the substantial rights of the appellant. On the contrary, the record demonstrates that the appellant was accorded a

fair trial and that the verdict is just and the sentences imposed on both counts were in accordance with law.

We respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

Peirson M. Hall,
United States Attorney,

J. J. Irwin,
Assistant United States Attorney,

Attorneys for Appellee.

7774

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

PAN AMERICAN PETROLEUM COMPANY, and WILLIAM C. McDUFFIE, as Receiver of Richfield Oil Company of California,

Appellants,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

PAN AMERICAN PETROLEUM COMPANY, and WILLIAM C. McDUFFIE, as Receiver of Richfield Oil Company of California,

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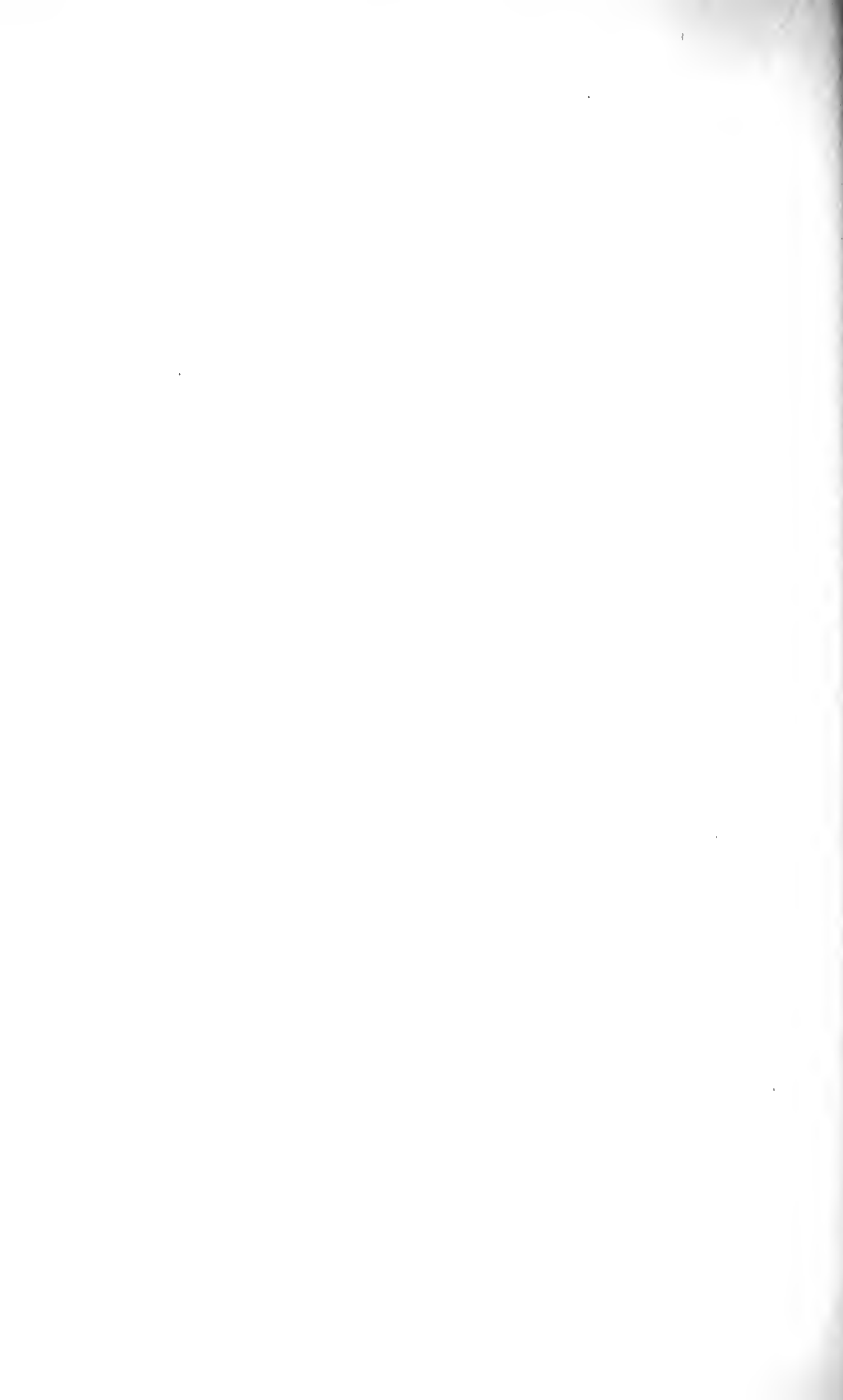

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

The Chase National Bank of the City)
of New York,)
)
Plaintiff,)
)
vs.)
) No. Eq-419-J
Pan American Petroleum Company,)
William C. McDuffie, as Receiver of) CITATION
Pan American Petroleum Company,) ON APPEAL
and William C. McDuffie, as Receiver)
of Richfield Oil Company of California,)
)
Defendants.)

UNITED STATES OF AMERICA,)
) SS
NINTH JUDICIAL CIRCUIT)

TO: THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, APPELLEE, GREETINGS:

You are hereby cited and admonished to appear at a Session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, in said Circuit, within thirty days from and after the date of this writ, pursuant to an

order filed in the office of the clerk of the United States District Court for the Southern District of California, Central Division, allowing an appeal by Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California, from that certain order, judgment, decree and declaration made and entered by said United States District Court in said cause on January 25, 1935, in which Appeal, you, the party first above mentioned, are the Appellee, and Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California are Appellants, to show cause, if any there be, why said order, judgment, decree and declaration in said United States District Court, above mentioned, should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable Wm. P. James, Judge of the District Court of the United States in and for the Southern District of California, Central Division, Ninth Judicial Circuit, this 26 day of January, 1935.

Wm. P. James

Judge of the United States District Court, Southern District of California, Central Division.

[Endorsed]: Due service of this Citation is admitted this 26 day of January, 1935. Mudge, Stern, Williams & Tucker. Freston & Files By Clarence M. Hanson, M. F. Solicitors for plaintiff. Filed Jan. 26, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,	)	
Plaintiff,	)	
against	)	In Equity
PAN AMERICAN PETROLEUM COMPANY, WILLIAM C. McDUFFIE, as Receiver of Pan American Petroleum Company, and WILLIAM C. McDUFFIE, as Receiver of Richfield Oil Company of California,	)	Cause No. 419-J
Defendants.	)	

COMPLAINT FOR DECLARATORY JUDGMENT.

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Central Division:

The Chase National Bank of the City of New York, a Trustee under the Mortgage and Deed of Trust of Pan American Petroleum Company, dated as of December 15, 1925 (hereinafter sometimes called the "First

Mortgage") by leave of this Court first duly had and obtained, brings this its Bill of Complaint against Pan American Petroleum Company (hereinafter sometimes called "Pan American"), William C. McDuffie, as Receiver of Pan American Petroleum Company, and William C. McDuffie, as Receiver of Richfield Oil Company of California (hereinafter sometimes called "Richfield") and said plaintiff shows to this Court as follows:

1. The plaintiff, The Chase National Bank of the City of New York, is, and at all the times wherein it is hereinafter mentioned was, a national banking association duly organized and existing under and by virtue of the laws of the United States of America, having its principal office and place of business at No. 18 Pine Street, in the Borough of Manhattan in the City and County of New York, a citizen of the State of New York and a resident and inhabitant of the Southern District of New York.

2. The defendant, Pan American Petroleum Company, is, and at all times wherein it is hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of Los Angeles in said State, a citizen of said State and a resident and inhabitant of the Southern District of California.

3. The defendant, William C. McDuffie, sued herein as Receiver of Pan American and as Receiver of Richfield, is a citizen and resident of the State of California and a resident and inhabitant of the Southern District of California.

4. This suit is brought under and by virtue of the provisions of an Act of Congress, to-wit, Section 274D of

the Judicial Code, and there are three separate grounds upon which the jurisdiction of this Court depends, namely:

FIRST: This is a suit of a civil nature in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three thousand dollars ($3,-000.00) between citizens of different states, the full name, citizenship and residence of each of the parties hereto being as set forth above,

SECOND: This is a suit arising under the Constitution and under the laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three thousand dollars ($3,000.00), for a declaratory judgment, declaring the rights of the plaintiffs and the defendants herein under an Act of Congress, to wit, Title 28, Section 847, of the United States Code as amended June 19, 1934,

THIRD: A substantial part of the property and premises owned by Pan American, including certain real estate and interests in land, in respect of the sale of which said declaratory judgment is sought is in the possession and custody and under the control of this Honorable Court, being in the possession of William C. McDuffie, as Receiver of Pan American Petroleum Company appointed by this Court in Consolidated Cause No. W-46-J and in Cause No. W-102-J, and is in the process of administration by this Honorable Court, and this suit, in so far as the jurisdiction of this Court depends upon this ground, is a suit ancillary to Consolidated Cause No. W-102-J pending in this Court, into which said causes were consolidated.

5. On or about March 5, 1932 the Suffolk Corporation, a corporation duly organized and existing under

any by virtue of the laws of the State of Delaware, a citizen of said State and a resident and inhabitant of the District of Delaware, brought a suit against Pan American, a corporation duly organized and existing under and by virtue of the laws of the State of California, a citizen of said State and a resident and inhabitant of the Southern District of California, in this Court, designated as Equity Cause No. W-45-J, wherein the matter in controversy exceeded, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00). On or about March 5, 1932, said William C. McDuffie as Receiver of Richfield brought a suit against Pan American in this Court designated as Equity Cause No. W-46-J, which cause was ancillary to Cause No. S-125-J, hereinafter mentioned in Paragraph 6 hereof. Said Cause No. W-46-J and said Cause No. W-45-J were consolidated into Consolidated Cause No. W-46-J. This Court in said Consolidated Cause No. W-46-J by its order entered March 5, 1932, duly appointed William C. McDuffie receiver of all property and assets of Pan American, real, personal and mixed and of whatsoever kind and description and wheresoever situated. Said William C. McDuffie so appointed receiver duly qualified as such and thereupon, under and by virtue of the said order, duly entered upon and took possession of all the property and assets of Pan American of every kind and description within the jurisdiction of this Court, and ever since has continued to hold possession of such assets.

On April 30, 1932, The Chase National Bank of the City of New York, the plaintiff herein, and Bank of America, as Trustees under the First Mortgage of Pan American, filed in this Court against Pan American and

others a bill of complaint to foreclose the First Mortgage of Pan American securing an outstanding issue of its First Mortgage 15-Year Convertible 6% Sinking Fund Gold Bonds aggregating $10,441,400 in principal amount, said cause in this Court being designated as Equity Cause No. W-102-J. Prior to the filing of said Bill of Foreclosure, the said trustees first applied for and obtained the consent of this Court in said Consolidated Cause No. W-46-J to file said Bill to foreclose the said mortgage upon assets then in possession and custody of this Court, said Foreclosure Cause being ancillary to said Consolidated Cause No. W-46-J. Subsequently said Consolidated Cause No. W-46-J and said Foreclosure Cause No. W-102-J were consolidated into Consolidated Cause No. W-102-J.

6. On or about January 15, 1931, The Republic Supply Company of California, a corporation duly organized and existing under and by virtue of the laws of the State of California, a citizen of said State and a resident and inhabitant of the Southern District of California brought a suit against Richfield Oil Company of California, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, a citizen of said State, and a resident and inhabitant of the District of Delaware, in this Court, Equity Cause No. S-125-J, wherein the matter in controversy exceeded, exclusive of interest and costs, the sum or value of Three thousand dollars ($3,000.00). This Court in said cause by its order entered January 15, 1931 duly appointed William C. McDuffie receiver of all the property and assets of Richfield, real, personal, and mixed, of whatsoever kind and description, within the jurisdiction of

this Court. Said William C. McDuffie so appointed receiver duly qualified as such and thereupon, under and by virtue of the said order, duly entered upon and took possession of all the property and assets of Richfield of every kind and description within the jurisdiction of this Court, and ever since has continued to hold possession of such assets and to operate the same. Richfield owns, subject to the lien of its Trust Indenture, dated May 1, 1929, securing its Collateral Trust Gold Bonds, all of the outstanding capital stock of Pan American. The Richfield Receiver has been operating properties of Pan American Petroleum Company since his appointment as such Richfield Receiver.

On or about July 28, 1931, the Security-First National Bank of Los Angeles, as Trustee, brought an action against Richfield and William C. McDuffie as Receiver of Richfield and other parties to foreclose the said Trust Indenture of Richfield, dated May 1, 1929, securing an outstanding bond issue of $24,981,000 principal amount, which action was designated Equity Cause No. X-63-J. Said Cause No. S-125-J and said Cause No. X-63-J were consolidated into Consolidated Cause No. S-125-J.

7. Among the assets of Pan American involved in said Consolidated Cause No. W-102-J are certain personal property and certain real estate and interests in land in large amounts, part of which personal property and part of which real estate and interests in land have been held in said Consolidated Cause to be mortgaged and part of which have been held to be unmortgaged. Similarly, among the assets of Richfield involved in said Consolidated Cause No. S-125-J are certain personal property and certain real estate and interests in land in large

amounts, part of which personal property and part of which real estate and interests in land have been held in said Consolidated Cause to be mortgaged and part of which have been held to be unmortgaged. In said Cause No. W-102-J, the receivership of said William C. McDuffie was extended to cover the mortgaged assets of Pan American within the jurisdiction of this Court and said Receiver is still the Receiver in said Cause No. W-102-J. In said Cause No. X-63-J, the receivership of William C. McDuffie was extended to cover the mortgaged assets of Richfield and said Receiver is still the receiver in said Cause No. X-63-J.

The real estate and interests in land of Pan American within the jurisdiction of this Court are intermingled with said personal property of Pan American and both are operated together as an integral unit of a going industrial concern.

It appearing to this Court that the properties and assets of Richfield and Pan American constituted such an integrated business unit from an operating standpoint as to make it probable that a joint sale of said properties may bring a higher sales price than would be obtained if the assets of Richfield and the assets of Pan American were sold separately; and it further appearing that a consolidation of the proceedings in the Richfield causes and in the Pan American causes with respect to hearings and orders on reorganization and sale of all of said properties, was reasonable and would serve the purpose of avoiding unnecessary costs or delays in the administration of justice, an order was made and entered by this Court on January 25, 1934, consolidating said Richfield causes designated as Consolidated Cause No. S-125-J and said Pan Amer-

ican causes designated as Consolidated Cause No. W-102-J for the purposes set forth in said order of consolidation, which order provided that all hearings, pleadings, orders, and other instruments or papers and any proceedings relating to the purposes for which said consolidation was ordered should be entitled, under the caption therein set forth, "In Equity, Consolidated Cause No. S-125-J," said consolidated cause being hereinafter referred to as the Consolidated Foreclosure Cause.

8. Prior to June 19, 1934, the date of the enactment of the amendment to Title 28, Section 847 of the United States Code, hereinafter set forth in Paragraph 9 hereof,

(a) the Pan American First Mortgage, hereinbefore mentioned, had been executed and delivered and the bonds secured thereby had been duly issued and sold to the public and were on said date valid and subsisting outstanding obligations of Pan American in the principal amount of $10,441,400;

(b) Suffolk Corporation was a creditor of Pan American, and had instituted the said suit designated as Equity Cause No. W-45-J to obtain the appointment of a receiver of the assets of Pan American and said William C. McDuffie had been appointed receiver as hereinbefore mentioned and said cause was then pending, and said William C. McDuffie was then acting as Receiver of the assets of Pan American within the jurisdiction of this Court, and is still so acting, and said cause is still pending in this Court;

(c) the said Foreclosure Cause No. W-102-J had been instituted by the Trustee under the First Mortgage of Pan American to foreclose said mortgage for the benefit

of the holders of the said outstanding bonds of Pan American, said receivership of William C. McDuffie had been extended to the mortgaged assets in said Cause No. W-102-J, said cause was pending on said date and is still pending and said William C. McDuffie was then acting as Receiver of the mortgaged assets of Pan American and is still so acting, and all other causes hereinbefore mentioned had been instituted and were then pending and are still pending in this Court;

(d) in said Consolidated Foreclosure Cause a motion had been made, returnable June 11, 1934, for this Court to settle the Final Decree of Foreclosure and Sale and cause the same to be signed, filed and entered, and was argued on said date, and the plaintiff herein, and other parties to said Consolidated Foreclosure Cause had presented to this Court on June 11, 1934 for signature a proposed Final Decree of Foreclosure and Sale providing for the sale at public judicial sale of substantially all of tangible property and assets of Pan American, including certain real estate and interests in land, and for the foreclosure of the First Mortgage in respect of all mortgaged property subject thereto including certain real estate and interests in land. Said Final Decree of Foreclosure and Sale has not yet been signed by this Court.

Promptly upon the signing by this Court of the Decree of Foreclosure and Sale a public judicial sale of said property of Pan American, including certain real estate and interests in land, will be had in the manner provided in Title 28, Sections 847 and 848 of the United States Code, unless it is necessary, by reason of the provisions of the amendment of Section 847 enacted June 19, 1934, that there be an appraisal under said statute as amended.

9. Title 28, §§847 and 848 of the United States Code (Act of Congress of March 3, 1893, c. 225, §§1 and 2, 27 Stat. 751) until the amendment of the Act on June 19, 1934, hereinafter referred to, read as follows:

"§847. Sales: real property under order or decree. All real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"§848. Same; personal property under order or decree. All personal property sold under any order or decree of any court of the United States shall be sold as provided in section 847 of this title, unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner."

The said Act of Congress of March 3, 1893, was amended by Act of Congress on June 19, 1934 by changing the period at the end of §847 above quoted to a colon and adding to said §847 the following:

"Provided, however, That the court may, upon petition therefor and a hearing thereon after such notice to parties in interest as said court shall direct, if it find that the best interests of said estate will be conserved thereby, order and decree the sale of such real estate or interest in land at private sale; Provided further, That the court shall appoint three disinterested persons to appraise said property, and said sale shall not be confirmed for less than two-thirds of the appraised value."

Said amendment is hereinafter referred to as the Appraisal Amendment.

10. An actual controversy exists between the plaintiff herein and the defendants Pan American and William C. McDuffie, as Receiver of Richfield, in that

A. The plaintiff herein contends that the Appraisal Amendment does not apply to a public judicial sale of any or all of the Pan American assets within the jurisdiction of this Court whether constituting personal property or real estate or interests in land to be held in said Consolidated Foreclosure Cause and said constituted causes thereof, and does not require the appointment by the Court of appraisers to appraise any or all of such assets, either before the date of such sale or after the date of such sale prior to the confirmation of such sale, and that any such sale, if determined by the Court otherwise to be fair and equitable, should be confirmed without compliance with the provisions of said Appraisal Amendment; which contention plaintiff makes on the following grounds:

1. That the Appraisal Amendment does not apply to public sales of real estate or interests in lands in judicial proceedings;

2. That the Appraisal Amendment does not apply to public sales of personal property in judicial proceedings;

3. That the Appraisal Amendment, if applicable to public sales in judicial proceedings of real estate or interests in land, does not apply to sales in judicial proceedings of real estate or interests in land where the same is intermingled with personal property and both are operated together as an integral unit of a going industrial concern such a*n* Pan American;

4. That the Appraisal Amendment if applicable to public sales in judicial proceedings does not apply to sales held in judicial proceedings which were instituted prior to June 19, 1934, the date of the enactment of said Amendment, by creditors to enforce obligations incurred prior thereto, or to foreclosure proceedings instituted prior thereto to foreclose mortgages executed prior to said date to secure obligations validly issued and outstanding before the date of the enactment of said Amendment.

B. The plaintiff herein further contends that if the Appraisal Amendment is applicable to a public judicial sale to be held in the said Consolidated Foreclosure Cause, and the said constituent causes thereof, of real estate or interests in land or other assets, it does not require the appointment of appraisers and an appraisal prior to the time of the sale, but only requires the appointment of appraisers and an appraisal prior to the confirmation of such sale in said Consolidated Foreclosure Cause and the constituent causes thereof.

C. The plaintiff herein further contends that if said Appraisal Amendment is applicable to public judicial sales of real estate or interests in land of Pan American in said pending Consolidated Foreclosure Cause and said constituent causes thereof, it does not apply to the judicial sale in said Consolidated Foreclosure Cause and said constituent causes thereof of any Pan American assets in so far as they consist of personal property or property other than real estate or interests in land, and that such personal property and other property may be sold in said Consolidated Foreclosure Cause and said constituent causes thereof at a judicial sale without the appointment of any

appraisers to appraise said personal property or other property other than real estate or interests in land.

D. Plaintiff herein further contends that if the Appraisal Amendment applies to public judicial sales of real estate or interests in land or other property of Pan American to be sold in said Consolidated Foreclosure Cause or said constituent causes thereof, all of which were instituted prior to June 19, 1934, the date of the enactment of said Appraisal Amendment, to enforce claims existing prior to said date and to foreclose mortgages executed and delivered to secure obligations validly issued and outstanding prior to said date, the said Appraisal Amendment is unconstitutional and void, in violation of the Fifth Amendment of the Constitution of the United States, prohibiting the taking of property without due process of law, in that it materially and adversely, arbitrarily and illegally affects and substantially impairs both the substantive and the remedial rights of the plaintiff herein.

E. The plaintiff is informed and believes and therefore alleges that the defendants Pan American and William C. McDuffie as Receiver of Richfield deny and oppose each and all of the foregoing contentions mentioned in subdivisions A, B, C, and D of this Paragraph 10, and contend that prior to any judicial sale of any real estate or interests in land of Pan American or any sale of personal property or other assets of Pan American in said Consolidated Foreclosure Cause and said constituent causes thereof, this Court must appoint appraisers as provided in said Appraisal Amendment, an appraisal must be had prior to the time of any such sale of both the real estate and interests in land of Pan American and of the personal property and other assets of Pan American to be sold

therein, and no such sale of real estate or interests in land of Pan American can be confirmed by the Court for less than two-thirds of the appraised value thereof, and no such sale of any personal property or other assets of Pan American can be confirmed by the Court for less than two-thirds of the appraised value thereof, and that said Appraisal Amendment as so construed and applied is in all respects valid, legal, and constitutional.

F. A controversy also exists between the plaintiff herein and the defendants Pan American and William C. McDuffie as Receiver of Richfield in that they cannot agree on the meaning of the term "appraised value" in the Appraisal Amendment, and if such Appraisal Amendment is applicable to a public judicial sale of the real estate and interests in land and other property of Pan American it will be necessary to know on what basis the property should be appraised, whether on the basis of a going concern, the fair and reasonable market value at the time of sale, the fair and reasonable value under normal conditions, the cost less depreciation, the cost of reproduction, the fair and reasonable market value at a fair judicial sale, or otherwise.

11. The plaintiff is informed and believes and therefore alleges that a declaratory judgment as prayed for herein is the sole remedy which can give a speedy and conclusive determination of the aforesaid controversy which exists between the plaintiffs and the defendants Pan American and William C. McDuffie as Receiver of Richfield for the reason that the controversy cannot be determined without long delay in said Consolidated Foreclosure Cause or in said constituent causes thereof because any order of this Court therein appointing ap-

praisers will not constitute a final appealable order of this Court, and such appeal could not be taken until after an appraisal of the property of Pan American had been made and a sale of such property held, and that such course of action would involve long delay, great expense and irreparable loss to the plaintiff, to the Pan American bondholders, to other Pan American creditors, and to the Government of the United States, which is entitled as hereinafter in paragraph 12 hereof set forth to receive the sum of $5,001,500, subject to certain adjustments, upon the sale of the properties to be sold in said Consolidated Foreclosure Cause and said constituent causes, and that such delay, expense, and loss will be caused and incurred by reason, among other things, of the following:

(1) The cost of an appraisal has been variously estimated at from $50,000 to $300,000, and the time that such appraisal would take has been variously estimated at from two to three months to one year. If as a result of appeals taken after the appraisal and after the sale it should be determined that no appraisal were necessary, the cost thereof and the delay involved would have been needlessly incurred.

(2) That if the Appraisal Statute applies only to real estate and interests in land of Pan American and not to personal and other property of Pan American, it would be necessary for the Court to segregate the real estate and interests in land from the personal and other property of Pan American before it will be possible for the appraisers to appraise the real estate and interests in land; that the separation of such personal property which consists in part of machinery and other property used in and about refineries, oil wells, and service stations and

other marketing and production facilities of Pan American will involve intricate questions of law and fact, similar in nature to the problems heretofore involved in the segregation of the mortgaged and unmortgaged assets of Pan American and Richfield in said Consolidated Foreclosure Cause and the said constituent causes, which segregation required a reference before a special master in hearings which extended over a period of more than one year, as well as the argument of exceptions to the special master's report and the passing upon such exceptions to the master's report by this Court, all of which required several months; that similar delay would be required in the segregation of the personal and other property from the real estate and interests in land of Pan American which might involve similar exceptions and determinations by this Court and might further involve appeals before the determination of the appraised value of the property to be offered for sale.

(3) If the said sale of real estate or interests in land and other assets of Pan American is held in said Consolidated Foreclosure Cause and in said constituent causes thereof without an appraisal pursuant to said Appraisal Amendment, the bidding on the property will be chilled for the reason that a doubt would exist as to whether a good title could be transferred at such judicial sale to such property without an appraisal, which doubt has already been expressed by certain prospective bidders, as well as a leading title company in Los Angeles, California.

(4) If the said sale of real estate or interests in land and other assets of Pan American is held in said Consolidated Foreclosure Cause and in said constituent causes after the appointment of appraisers and an appraisal

of such real estate or interest in land or other property before the sale thereof, the bidding will be chilled for the following reason:

The combined properties of Richfield and Pan American, exclusive of certain intangibles, were appraised as of January 15, 1931, by engineers retained by the Receiver on a going concern basis at approximately $69,000,000, and on a forced sale basis at approximately $24,000,000. If the appraisers appointed by the Court should again appraise the properties at $69,000,000, the properties involved would have to be purchased at the said judicial sale for two-thirds of that amount, namely, for $46,000,000, if the Appraisal Amendment is applicable, or the sale would not be confirmed. Many prospective purchasers might be able, willing, and anxious to bid less than $46,000,000 for the property but would be deterred from bidding by reason of such appraisal of $69,000,000 and similarly the bidding would be chilled if the property should be appraised at any other particular amount by eliminating possible bidders who would desire to bid less than two-thirds of said appraised amount. If it should be determined, after such appraisal had been had, that the Appraisal Statute were inapplicable, the loss to the bondholders, creditors, and the Government of the United States would be irreparable on account of such chilling of the bidding at said judicial sale.

(5) The Pan American receiver has repeatedly reported to the Court in his periodic reports filed in the Consolidated Foreclosure Cause in substance that the properties of Richfield and Pan American should be sold at an early date on account of his opinion that only through a prompt sale or reorganization can the best return be made to the creditors and bondholders of the

companies, and has testified in proceedings before the Court in said Consolidated Foreclosure Cause and said constituent causes thereof that the interests of the creditors and bondholders will be imperiled by long continuance of the receivership proceedings on account of the fact that approximately 85% of the oil required for the operation of the Richfield and Pan American properties must be purchased from others and that recently during one of the periodic gasoline price wars he has had to sell gasoline at a loss.

(6) That in view of the appraisal made by engineers retained by the Receivers of the Richfield and Pan American properties at approximately $69,000,000, as aforesaid (which, if again appraised at said amount, would require a bid of $46,000,000 in order to have the sale confirmed) and in view of the fact that after prolonging negotiations for the sale of these properties by committees representing various classes of creditors and bondholders of Pan American and Richfield, and after wide publicity of the fact that these properties are for sale, no firm offers have been received from any prospective purchasers to the knowledge of plaintiff except for amounts many million dollars less than $46,000,000, it seems probable that no foreclosure sale of the mortgaged property or no judicial sale of the other properties of Pan American could be consummated; and in that case the receivership of Pan American and Richfield would be continued indefinitely and the bondholders, creditors, and the Government would be delayed in recovering upon their claims, and large costs in advertising and holding such sale would have been needlessly incurred.

(7) That in said Consolidated Foreclosure Cause, and certain constituent causes thereof, this Court has taken

jurisdiction and supervision of a plan and agreement of reorganization involving the sale of the unmortgaged assets of Pan American for $525,000 and all of the other assets of Pan American and Richfield with certain exceptions for $23,500,000 payable in cash and securities, to a purchaser whose offer has been accepted by certain committees of bondholders and creditors of Pan American and Richfield, and that plaintiff is advised by said committees that said plan has been accepted by a majority of the Pan American bondholders, but that unless said sale can be held without undue delay the said plan is in imminent danger of collapsing through the withdrawal of said offer by said purchaser, and said committees have urged this Court and the plaintiff, by motions made in said Consolidated Foreclosure Cause and certain constituent causes thereof, and otherwise, to effect a prompt sale of such properties so that such offer would not be lost, and so that the receivership could be terminated and the property sold to such purchaser or to any other purchasers making a better bid for the properties.

12. Among the creditors of Pan American is the United States of America (hereinafter called the "Government") which holds a judgment against Pan American in the sum of Nine million, two hundred seventy-seven thousand, six hundred sixty-six and seventeen one-hundredths dollars ($9,277,666.17), together with interest thereon at 7% per annum from November 29, 1932, which judgment was obtained on or about January 14, 1933, in the case of United States of America v. Pan American Petroleum Company, In Equity, Cause No. B-115-M. The Government intervened in certain of the constituent causes of said Consolidated Foreclosure Cause and is a party to said Consolidated Foreclosure Cause. Pursuant to a stip-

ulation of settlement dated January 17, 1933, the Government will be entitled to the payment of the sum of $5,-001,500, subject to certain adjustments, upon the sale of Pan American and Richfield assets in said Consolidated Foreclosure Cause. Said stipulation was approved by the Attorney General and the Secretary of the Navy pursuant to a joint resolution of the Congress of the United States (Senate Joint Resolution No. 13, 73rd Congress), signed by the President of the United States, and said stipulation was also approved by this Court in orders entered May 15, 1933.

The plaintiff is informed and believes and therefore alleges that the holding of an appraisal in said Consolidated Foreclosure Cause and said constituent causes will cause unnecessary delay and expense and cause great loss to the Government which is not receiving interest on its claim under the terms of the aforesaid stipulation, which was made, entered into and approved with the expectation that there would be an early sale of the assets in said Consolidated Foreclosure Cause and said constituent causes.

WHEREFORE, the plaintiff prays that a declaratory judgment be made and entered herein by this Court, adjudging and decreeing:

(1) That the Appraisal Amendment does not apply to a public judicial sale of any or all of the Pan American assets within the jurisdiction of this Court, whether constituting personal property or real estate or interests, in land to be held in said Consolidated Foreclosure Cause and said constituent causes thereof and does not require the appointment by the Court of appraisers to appraise any or all of such assets, either before the date of such

sale or after the date of such sale prior to the confirmation of such sale, and that any such sale, if determined by the Court otherwise to be fair and equitable, should be confirmed without compliance with the provisions of said Appraisal Amendment; or adjudging and decreeing to what extent such Appraisal Amendment is applicable to such public judicial sale, and when such appraisers must be appointed and said appraisal made.

(2) The meaning of the term "appraised value" in the Appraisal Amendment, if it applies to such sale, and the basis upon which such value should be determined by such appraisers.

(3) That the Appraisal Amendment, if applicable to the sale of real estate or interests in land or other assets of Pan American to be sold at public judicial sale in the said Consolidated Foreclosure Cause and said constituent causes thereof, is unconstitutional, null, and void.

(4) That the plaintiff may have such other, different and further relief, decree or judgment in the premises as may be just and proper, together with the costs and disbursements of this suit.

Joseph V. Kline
Clarence M. Hanson

Solicitors for plaintiff The Chase National Bank of the City of New York.

MUDGE, STERN, WILLIAMS & TUCKER,
20 Pine Street,
New York, N. Y.

FRESTON & FILES,
650 South Spring Street,
Los Angeles, California.

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

GEORGE A. KINNEY, being duly sworn, deposes and says, that he is an officer of THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, the plaintiff*s* above named, to wit, a Vice-President thereof, that he has read the foregoing bill of complaint and knows the contents thereof, that the allegations contained therein in respect to the acts of said The Chase National Bank of the City of New York are true to his own knowledge, and that as to all other allegations contained therein he is credibly informed and believes that the same are true; that the reason this affidavit of verification is made by him and not by said plaintiff is that said plaintiff is a National Banking Association and he is said officer thereof.

George A. Kinney

Sworn to before me this 18th *18th* day of October, 1934.

[Seal] T. J. Pol

T. J. POL

Notary Public, New York County
N. Y. Co. Clk's No. 263, Reg. No. 5P359
Commission expires March 30, 1935

[Endorsed]: Filed Oct. 20, 1934.

[Title of Court and Cause.]

ANSWER OF DEFENDANT WILLIAM C. McDUFFIE, as Receiver of RICHFIELD OIL COMPANY OF CALIFORNIA.

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Central Division:

The defendant, William C. McDuffie, as Receiver of Richfield Oil Company of California, in answer to the Bill of Complaint, on file herein,

I.

Admits all of the allegations contained in paragraphs 1 to 9, inclusive, and the first paragraph and the subparagraphs 1, 2, 3, 5 and 7 of paragraph 11 and the first paragraph of paragraph 12.

II.

Alleges that Richfield Oil Company of California of which this defendant is the Receiver owns $1,296,000.00 par amount of the bonds secured by the First Mortgage between The Chase National Bank of the City of New York and Bank of America, as Trustees, and Pan American Petroleum Company, dated as of December 15, 1925; and further that this defendant has been operating the properties of defendant Pan American Petroleum Company under the provisions of an operating agreement, dated November 1, 1931, between this defendant, Pan American Petroleum Company and Los Angeles Midway Pipe Line Company, a wholly owned subsidiary of Pan American Petroleum Company.

III.

In answer to paragraph 10, said defendant admits that an actual controversy exists between the plaintiff herein, this defendant and defendant Pan American Petroleum Company in the matter set forth in paragraph 10, in that

A. This defendant contends that the said Appraisal Amendment applies to a public judicial sale as well as to a private sale of any and all of the Pan American Petroleum Company assets, whether real estate, interests in land or personal property within the jurisdiction of this Court, and elsewhere, involved in said Consolidated Foreclosure Cause, or said Constituent Cause, No. W-102-J, or otherwise; that said Appraisal Amendment requires the appointment by this Court of appraisers to appraise any and all assets of said Pan American Petroleum Company prior to the date of sale of said assets and, in all events, prior to the date of confirmation of said sale; that said Appraisal Amendment requires that such sale should not be confirmed, even though otherwise fair and equitable, unless its provisions shall first have been complied with, and in support of this, this defendant further contends that:

1. Said Appraisal Amendment applies to public as well as private sales of real estate and interests in land in said judicial sales;

2. Said Appraisal Amendment applies to public sales of personal property in judicial proceedings unless, as provided in Section 848 of the United States Judicial Code, in the opinion of the Court rendering such order or decree of sale, it would be best to sell such personal property in some other manner;

3. Said Appraisal Amendment applies to sales, both public and private in judicial proceedings even though real estate and interests in land are intermingled with personal property and both are operated together as an integral unit of a going industrial concern, such as is the case of Pan American Petroleum Company;

4. Said Appraisal Amendment applies to public sales in judicial proceedings even though said judicial proceedings were instituted prior to June 19, 1934, by creditors to enforce obligations incurred prior to said date and applies to foreclosure proceedings instituted prior to said date to foreclose a mortgage executed prior to said date to secure obligations validly incurred and outstanding prior to said date of the enactment of said Appraisal Amendment;

B. This defendant contends that the Appraisal Amendment requires the appointment of appraisers and the appraisal prior to the time of sale and not alone prior to confirmation of sale, for to hold otherwise would make possible a situation where all proceedings for a judicial sale, which are normally quite costly, might be rendered useless, if the price bid at the sale did not exceed two-thirds of the appraised value found by three disinterested appraisers and further contends that the Court should construe the Appraisal Amendment so as to eliminate the possibility of such wasteful proceedings.

C. This defendant contends that the Appraisal Amendment is applicable to judicial sales in the Consolidated Foreclosure Cause and in said constituent Causes thereof, of any and all Pan American Petroleum Company assets, in so far as they consist of personal property unless, as provided in Section 848, in the opinion of the Court

rendering such order or decree, it would be best to sell said personal property in some other manner, and this defendant alleges that the Court having jurisdiction of said Consolidated Foreclosure Cause and said Constituent Cause No. W-102-J, has not made or entered any such order;

D. This defendant contends that the Appraisal Amendment is constitutional and denies that if the Appraisal Amendment applies to public judicial sales of real estate or interests in land or other property of Pan American Petroleum Company to be sold in said Consolidated Foreclosure Cause or said constituent causes thereof, all of which were instituted prior to June 19, 1934, the date of the enactment of said Appraisal Amendment, it is unconstitutional or void; denies further that said Appraisal Amendment is void or unconstitutional as depriving the plaintiff of property without due process or otherwise; denies that the Appraisal Amendment materially or adversely or arbitrarily or illegally or otherwise affects or substantially impairs either the substantial or the remedial rights of the plaintiff herein.

E. This defendant admits paragraph E of paragraph 10.

F. This defendant alleges that said Section 847 and Section 848 require the appraisal of the property of Pan American Petroleum Company by three distinterested persons upon the basis of a going concern having in mind the financial returns which may be obtained from said property from the uses to which it is being employed or may be employed.

WHEREFORE, defendant William C. McDuffie, as Receiver of Richfield Oil Company of California, prays that a declaratory judgment be made and entered herein by this Court adjudging and decreeing:

1. That the Appraisal Amendment applies to a public judicial sale of any and all of the Pan American Petroleum Company assets within the jurisdiction of this Court, whether constituting personal property or real estate or interests in land, to be held in said Consolidated Foreclosure Cause and said Constituent Causes thereof, and that said Appraisal Amendment requires the appointment by this Court of appraisers to appraise any and all of such assets before the date of the sale thereof and that such sale, if determined by this Court otherwise to be fair and equitable should be confirmed only upon compliance with the provisions of said Appraisal Amendment.

2. The meaning of the term "appraised value" in the Appraisal Amendment and the basis upon which such value should be determined by such appraisers.

3. That the Appraisal Amendment as applied to the sale of real estate or interests in land and other assets of Pan American Petroleum Company sold at judicial sale in said Consolidated Foreclosure Cause and said Constituent Causes thereof, is constitutional;

and further prays that the Defendant may have judgment for its costs and expenses of suit.

DATED: Los Angeles, California, October 23, 1934.

GIBSON, DUNN & CRUTCHER

BY Homer D. Crotty

Solicitors for William C. McDuffie, as Receiver of RICHFIELD OIL COMPANY OF CALIFORNIA.

United States of America)
Southern District of California) SS.
County of Los Angeles)
State of California)

WM. C. McDUFFIE, being by me first duly sworn, deposes and says: That as Receiver of Richfield Oil Company of California he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Wm. C. McDuffie

SUBSCRIBED and SWORN to before me this 23rd day of October, 1934.

[Seal] H. R. Leonard

NOTARY PUBLIC in and for the County of Los Angeles, State of California.

My Commission expires March 30, 1935.

[Endorsed]: Received copy of within answer this 23 day of Oct. 1934. Mudge, Stern, Williams & Tucker and Freston & Files By Clarence M. Hanson Solicitors for Plaintiff Filed Oct. 24, 1934.

[Title of Court and Cause.]

ANSWER OF DEFENDANT PAN AMERICAN PETROLEUM COMPANY.

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Central Division:

The defendant, PAN AMERICAN PETROLEUM COMPANY, in answer to the Bill of Complaint, on file herein,

I.

Admits all of the allegations contained in paragraphs 1 to 9 inclusive, and the first paragraph and the sub-paragraphs 1, 2, 3, 5 and 7 of paragraph 11 and the first paragraph of paragraph 12.

II.

In answer to paragraph 10, said defendant admits that an actual controversy exists between the plaintiff herein, this defendant and defendant William C. McDuffie, as Receiver of Richfield Oil Company of California in the matter set forth in paragraph 10, in that

A. This defendant contends that the said Appraisal Amendment applies to a public judicial sale as well as to a private sale of any and all of the Pan American Petroleum Company assets, whether real estate, interests in land or personal property within the jurisdiction of this Court, and elsewhere, involved in said Consolidated Foreclosure Cause, or said Constituent Cause, No. W-102-J,

or otherwise; that said Appraisal Amendment requires the appointment by this Court of appraisers to appraise any and all assets of said Pan American Petroleum Company prior to the date of sale of said assets and, in all events, prior to the date of confirmation of said sale; that said Appraisal Amendment requires that such sale should not be confirmed, even though otherwise fair and equitable, unless its provisions shall first have been complied with, and in support of this Defendant further contends that:

1. Said Appraisal Amendment applies to public as well as private sales of real estate and interests in land in said judicial sales;

2. Said Appraisal Amendment applies to public sales of personal property in judicial proceedings, unless, as provided in Section 848 of the United States Judicial Code, in the opinion of the Court rendering such order or decree of sale, it would be best to sell such personal property in some other manner;

3. Said Appraisal Amendment applies to sales, both public and private, in judicial proceedings even though real estate and interests in land are intermingled with personal property and both are operated together as an integral unit of a going industrial concern, such as is the case of Pan American Petroleum Company;

4. Said Appraisal Amendment applies to public sales in judicial proceedings even though said judicial proceedings were instituted prior to June 19, 1934, by creditors

to enforce obligations incurred prior to said date and applies to foreclosure proceedings instituted prior to said date to foreclose a mortgage executed prior to said date to secure obligations validly incurred and outstanding prior to said date of the enactment of said Appraisal Amendment.

B. This defendant contends that the Appraisal Amendment requires the appointment of appraisers and the appraisal prior to the time of sale and not alone prior to confirmation of sale, for to hold otherwise would make possible a situation where all proceedings for a judicial sale, which are normally quite costly, might be rendered useless, if the price bid at the sale did not exceed two-thirds of the appraised value found by three disinterested appraisers, and further contends that the Court should construe the Appraisal Amendment so as to eliminate the possibility of such wasteful proceedings.

C. This defendant contends that the Appraisal Amendment is applicable to judicial sales in the Consolidated Foreclosure Cause and in said constituent causes thereof, of any and all Pan American Petroleum Company assets, in so far as they consist of personal property unless, as provided in Section 848, in the opinion of the Court rendering such order or decree, it would be best to sell said personal property in some other manner, and this defendant alleges that the Court having jurisdiction of said Consolidated Foreclosure Cause and said constituent cause, No. W-102-J, has not made or entered any such order:

D. This defendant contends that the Appraisal Amendment is constitutional and denies that if the Appraisal Amendment applies to public judicial sales of real estate or interests in land or other property of Pan American Petroleum Company to be sold in said Consolidated Foreclosure Cause or said constituent causes thereof, all of which were instituted prior to June 19, 1934, the date of the enactment of said Appraisal Amendment, it is unconstitutional or void; denies further that said Appraisal Amendment is void or unconstitutional as depriving the plaintiff of property without due process or otherwise; denies that the Appraisal Amendment materially or adversely or arbitrarily or illegally or otherwise affects or substantially impairs either the substantial or the remedial rights of the plaintiff herein;

E. This defendant admits paragraph E of paragraph 10;

F. This defendant alleges that said Section 847 and Section 848 require the appraisal of the property of Pan American Petroleum Company to three disinterested persons upon the basis of a going concern having in mind the financial returns which may be obtained from said property from the uses to which it is being employed or may be employed.

WHEREFORE, defendant Pan American Petroleum Company, prays that a declaratory judgment be made and entered herein by this Court adjuding and decreeing:

1. That the Appraisal Amendment applies to a public judicial sale of any and all of the Pan American Petroleum Company assets within the jurisdiction of this Court, whether constituting personal property or real estate or interests in land, to be held in said Consolidated Foreclosure Cause and said constituent causes thereof, and that said Appraisal Amendment requires the appointment by this Court of appraisers to appraise any and all of such assets before the date of the sale thereof and that such sale, if determined by this Court otherwise to be fair and equitable, should be confirmed only upon compliance with the provisions of said Appraisal Amendment.

2. The meaning of the term "appraised value" in the Appraisal Amendment and the basis upon which such value should be determined by such appraisers.

3. That the Appraisal Amendment as applied to the sale of real estate or interests in land and other assets of Pan American Petroleum Company sold at judicial sale in said Consolidated Foreclosure Cause and said constituent causes thereof, is constitutional;

and further prays that this Defendant may have judgment for its costs and expenses of suit.

DATED: Los Angeles, California, October 23, 1934.

Clayton T Cochran

Solicitor for Pan American Petroleum Company.

STATE OF CALIFORNIA)
: ss.
COUNTY OF LOS ANGELES)

J. S. WALLACE, being by me first duly sworn, deposes and says: that he is an officer, to-wit, Vice President of Pan American Petroleum Company, one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

J. S. Wallace D. J. E.

SUBSCRIBED and SWORN to before me this 23rd day of October, 1934.

[Seal] H. R. Leonard

NOTARY PUBLIC in and for the County of Los Angeles, State of California.

My Commission expires 3/30/35

[Endorsed]: Received copy of within answer this 23 day of Oct. 1934 Mudge, Stern, Williams & Tucker and Freston & Files By Clarence M. Hanson Solicitors for Plaintiff. Filed Oct 24, 1934.

[Title of Court and Cause.]

ANSWER OF WILLIAM C. McDUFFIE as Receiver of PAN AMERICAN PETROLEUM COMPANY.

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Central Division:

The defendant, WILLIAM C. McDUFFIE, as Receiver of PAN AMERICAN PETROLEUM COMPANY, in answer to the Bill of Complaint on file herein, admits all matters of fact alleged in said Complaint.

WHEREFORE, defendant prays that a declaratory judgment be made and entered by this Court adjudicating the controversies between the plaintiff and other parties to this cause as speedily as possible.

DATED: Los Angeles, California, October 22, 1934.

GIBSON, DUNN & CRUTCHER

BY Homer D. Crotty

Solicitors for William C. McDuffie, as Receiver of Pan American Petroleum Company.

United States of America)
Southern District of California) SS.
County of Los Angeles)
State of California)

WM. C. McDUFFIE, being by me first duly sworn, deposes and says: That as Receiver of Pan American Petroleum Company he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Wm. C. McDuffiie

SUBSCRIBED and SWORN to before me this 22nd day of October, 1934.

[Seal] H. R. Leonard

NOTARY PUBLIC in and for the County of Los Angeles, State of California.

My Commission expires March 30, 1935.

[Endorsed]: Received copy of the within answer this 23rd day of Oct. 1934 Freston & Files and Mudge, Stern, Williams & Tucker By Clarence M. Hanson, solicitors for plaintiff Filed Oct 24, 1934.

[TITLE OF COURT AND CAUSE.]

NOTICE OF MOTION TO STRIKE FROM COMPLAINT

TO THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff and to JOSEPH V. KLINE and CLARENCE M. HANSON, its solicitors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendant, William C. McDuffie, as Receiver of Richfield Oil Company of California will on Monday the 29th day of October, 1934, at 10:00 A. M., or as soon thereafter as counsel can be heard, in the Court Room of the above entitled Court presided over by the Honorable Wm. P. James in the Federal Building in the City of Los Angeles, State of California, move to strike from said Complaint the various portions thereof specifically set forth in the Motion, a copy of which is hereto attached.

Said Motion will be made upon the grounds that the portions of said Complaint specified in said Motion are impertinent, incompetent, irrelevant, immaterial and redundant and state no facts which are material to the controversy described in said Complaint.

Said Motion will be made upon the grounds aforesaid and upon all the pleadings and papers in this case and

upon the basis of the Points and Authorities, a copy of which is hereto attached.

DATED: Los Angeles, California, October 23, 1934.

GIBSON, DUNN & CRUTCHER

By Homer D. Crotty

Solicitors for Defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

David P. Evans
Of Counsel

[Endorsed]: Received copy of the within notice this 23 day of Oct. 1934 Mudge, Stern, Williams & Tucker, and Freston & Files By Clarence M. Hanson Solicitors for Plaintiff. Filed Oct. 24, 1934.

[Title of Court and Cause.]

MOTION TO STRIKE FROM COMPLAINT

NOW COMES the defendant William C. McDuffie, as Receiver of Richfield Oil Company of California and moves the Court to strike from plaintiff's Complaint herein the following portions thereof, to-wit:

1. From line 35 on page 9 of said Complaint to and including line 6 on page 10 of said Complaint, which portions of said Complaint read as follows:

"(4) If the said sale of real estate or interests in land and other assets of Pan American is held in said Consolidated Foreclosure Cause and in said constituent causes after the appointment of appraisers and an appraisal of such real estate or interest in land or other property before the sale thereof, the bidding will be chilled for the following reason:

"The combined properties of Richfield and Pan American, exclusive of certain intangibles, were appraised as of January 15, 1931, by engineers retained by the Receiver on a going concern basis, at approximately $69,-000,000, and on a forced sale basis at approximately $24,000,000. If the appraisers appointed by the Court should again appraise the properties at $69,000,000, the properties involved would have to be purchased at the said judicial sale for two-thirds of that amount, namely, for $46,000,000, if the Appraisal Amendment is applicable, or the sale would not be confirmed. Many prospective purchasers might be able, willing, and anxious to bid less than $46,000,000 for the property but would be deterred from bidding by reason of such appraisal of $69,000,000

and similarly the bidding would be chilled if the property should be appraised at any other particular amount by eliminating possible bidders who would desire to bid less than two-thirds of said appraised amount. If it should be determined, after such appraisal had been had that the Appraisal Statute were inapplicable, the loss to the bondholders, creditors, and the Government of the United States would be irreparable on account of such chilling of the bidding at said judicial sale."

2. From line 22 on page 10 of said complaint to and including line 40 on page 10 of said Complaint, which portions of said Complaint read as follows:

"(6) That in view of the appraisal made by engineers retained by the Receivers of the Richfield and Pan American properties at approximately $69,000,000, as aforesaid (which, if again appraised at said amount, would require a bid of $46,000,000 in order to have the sale confirmed) and in view of the fact that after prolonging negotiations for the sale of these properties by committees representing various classes of creditors and bondholders of Pan American and Richfield, and after wide publicity of the fact that these properties are for sale, no firm offers have been received from any prospective purchasers to the knowledge of plaintiff except for amounts many million dollars less than $46,000,000, it seems probable that no foreclosure sale of the mortgaged property or no judicial sale of the other properties of Pan American could be consummated; and in that case the receivership of Pan American and Richfield would be continued indefinitely and the bondholders, creditors, and the Government would be delayed in recovering upon their claims, and large costs in

advertising and holding such sale would have been needlessly incurred."

3. From line 24 on page 11 of said Complaint to and including line 31 on page 11 of said Complaint, which portions of said Complaint read as follows:

"The plaintiff is informed and believes and therefore alleges that the holding of an appraisal in said Consolidated Foreclosure Cause and said constituent causes will cause unnecessary delay and expense and cause great loss to the Government which is not receiving interest on its claim under the terms of the aforesaid stipulation, which was made, entered into and approved with the expectation that there would be an early sale of the assets in said Consolidated Foreclosure Cause and said constituent causes."

Said Motion is made upon the grounds that the words and figures contained in portions of said Complaint hereinabove set forth, and all thereof, are impertinent, incompetent, irrelevant, immaterial and redundant and state no facts which are material to the controversy alleged in said Complaint.

The foregoing Motion is based upon the grounds stated and upon all the pleadings and papers on file in this cause.

DATED: October 23, 1934.

GIBSON, DUNN & CRUTCHER,
By Homer D. Crotty
Solicitors for Defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

David P. Evans
Of Counsel

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE FROM COMPLAINT

I.

Impertinent, irrelevant and redundant allegations may be stricken on Motion.

Equity Rule 21

Larco vs. Casaneuava, 30 Cal. 561, 565

McCaughey vs. Schuette, 117 Cal. 223, 225

GIBSON, DUNN & CRUTCHER

By Homer D. Crotty

Solicitors for Defendant, William C. McDuffie, as Receiver of Richfield Oil Company of California

David P. Evans

Of Counsel

[Endorsed]: Received copy of the within motion this 23 day of Oct. 1934 Mudge, Stern, Williams & Tucker, and Freston & Files By Clarence M. Hanson, Solicitors for Plaintiff. Filed Oct 24, 1934.

[TITLE OF COURT AND CAUSE.]

NOTICE OF MOTION TO STRIKE FROM COMPLAINT

TO THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff and to JOSEPH V. KLINE and CLARENCE M. HANSON, its solicitors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendant Pan American Petroleum Company will on Monday the 29th day of October, 1934, at 10:00 A. M., or as soon thereafter as counsel can be heard, in the Court Room of the above entitled Court presided over by the Honorable Wm. P. James in the Federal Building in the City of Los Angeles, State of California, move to strike from said Complaint the various portions thereof specifically set forth in the Motion, a copy of which is hereto attached.

Said Motion will be made upon the grounds that the portions of said Complaint specified in said Motion are impertinent, incompetent, irrelevant, immaterial and redundant and state no facts which are material to the controversy described in said Complaint.

Said Motion will be made upon the grounds aforesaid and upon all the pleadings and papers in this case and upon the basis of the Points and Authorities, a copy of which is hereto attached.

DATED: Los Angeles, California, October 23, 1934.

Clayton T. Cochran
Solicitor for Defendant Pan American
Petroleum Company

[Endorsed]: Received copy of within notice this 23 of Oct. 1934 Mudge, Stern, Williams & Tucker Freston & Files By Clarence M. Hanson Solicitors for Plaintiff. Filed Oct 24, 1934.

[TITLE OF COURT AND CAUSE.]

MOTION TO STRIKE FROM COMPLAINT

NOW COMES the defendant Pan American Petroleum Company and moves the Court to strike from plaintiff's Complaint herein the following portions thereof, to-wit:

1. From line 35 on page 9 of said Complaint to and including line 6 on page 10 of said Complaint, which portions of said Complaint read as follows:

"(4) If the said sale of real estate or interests in land and other assets of Pan American is held in said Consolidated Foreclosure Cause and in said constituent causes after the appointment of appraisers and an appraisal of such real estate or interest in land or other property before the sale thereof, the bidding will be chilled for the following reason:

"The combined properties of Richfield and Pan American, exclusive of certain intangibles, were appraised as of January 15, 1931, by engineers retained by the Receiver on a going concern basis at approximately $69,000,000, and on a forced sale basis at approximately $24,000,000. If the appraisers appointed by the Court should again appraise the properties at $69,000,000, the properties involved would have to be purchased at the said judicial sale for two-thirds of that amount, namely, for $46,000,000, if the Appraisal Amendment is applicable, or the sale would not be confirmed. Many prospective pur-

chasers might be able, willing and anxious to bid less than $46,000,000 for the property but would be deterred from bidding by reason of such appraisal of $69,000,000 and similarly the bidding would be chilled if the property should be appraised at any other particular amount by eliminating possible bidders who would desire to bid less than two-thirds of said appraised amount. If it should be determined, after such appraisal had been had that the Appraisal Statute were inapplicable, the loss to the bondholders, creditors, and the Government of the United States would be irreparable on account of such chilling of the bidding at said judicial sale."

2. From line 22 on page 10 of said Complaint to and including line 40 on page 10 of said Complaint, which portions of said Complaint read as follows:

"(6) That in view of the appraisal made by engineers retained by the Receivers of the Richfield and Pan American properties at approximately $69,000,000, as aforesaid (which, if again appraised at said amount, would require a bid of $46,000,000 in order to have the sale confirmed) and in view of the fact that after prolonging negotiations for the sale of these properties by committees representing various classes of creditors and bondholders of Pan American and Richfield, and after wide publicity of the fact that these properties are for sale, no firm offers have been received from any prospective purchasers to the knowledge of plaintiff except for amounts many million dollars less than $46,000,000, it seems probable that no fore-

closure sale of the mortgaged property or no judicial sale of the other properties of Pan American could be consummated; and in that case the receivership of Pan American and Richfield would be continued indefinitely and the bondholders, creditors, and the Government would be delayed in recovering upon their claims, and large costs in advertising and holding such sale would have been needlessly incurred."

3. From line 24 on page 11 of said Complaint to and including line 31 on page 11 of said Complaint, which portions of said Complaint read as follows:

"The plaintiff is informed and believes and therefore alleges that the holding of an appraisal in said Consolidated Foreclosure Cause and said constituent causes will cause unnecessary delay and expense and cause great loss to the Government which is not receiving interest on its claim under the terms of the aforesaid stipulation, which was made, entered into and approved with the expectation that there would be an early sale of the assets in said Consolidated Foreclosure Cause and said constituent causes."

Said Motion is made upon the grounds that the words and figures contained in portions of said Complaint hereinabove set forth, and all thereof, are impertinent, incompetent, irrelevant, immaterial and redundant and state no facts which are material to the controversy alleged in said Complaint.

The foregoing Motion is based upon the grounds stated and upon all the pleadings and papers on file in this cause.

DATED: October 23, 1934.

Clayton T. Cochran
Solicitor for Defendant Pan American
Petroleum Company

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE FROM COMPLAINT

I.

Impertinent, irrelevant and redundant allegations may be stricken on Motion.

Equity Rule 21

Larco vs. Casaneuava, 30 Cal. 561, 565

McCaughey vs. Schuette, 117 Cal., 223, 225

Clayton T. Cochran
Solicitor for Defendant, Pan American
Petroleum Company

[Endorsed]: Received copy of the within motion this 23 of Oct., 1934 Mudge, Stern, Williams & Tucker and Freston & Files By Clarence M. Hanson Solicitors for Plaintiff. Filed Oct 24, 1934.

[Title of Court and Cause.]

No. Eq-419-J.

Pursuant to the stipulation attached hereto, IT IS ORDERED that the motions of Pan American Petroleum Co. and William C. McDuffie, receiver of Richfield Oil Company to strike certain portions of the complaint of plaintiff are submitted for decision.

Dated November 2, 1934.

Wm. P. James
U. S. District Judge.

November 1, 1934

Honorable William P. James
Federal Building
Temple and Main Streets
Los Angeles California

Dear Sir:

RE: CHASE NATIONAL BANK OF THE CITY OF NEW YORK vs. PAN AMERICAN PETROLEUM CO., et al. In Equity No. 419-J

Confirming the conversation between yourself, Mr. Hanson and Mr. Crotty, it is hereby stipulated that the Motions to Strike certain portions of the Complaint of The Chase National Bank of the City of New York, filed

by Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California, may be submitted without argument.

Very truly yours,

GIBSON, DUNN & CRUTCHER

By Homer D. Crotty

Solicitors for William C. McDuffie, as Receiver of Richfield Oil Company of California and for William C. McDuffie, as Receiver of Pan American Petroleum Company.

MUDGE, STERN, WILLIAMS & TUCKER
FRESTON & FILES

By Clarence M. Hanson

Solicitors for The Chase National Bank of the City of New York.

Clayton T. Cochran

Solicitor for Pan American Petroleum Company.

[Endorsed]: Filed Nov. 2, 1934.

[Title of Court and Cause.]

ORDER.

In this suit for declaratory relief the court, on the 31st of December, 1934, made its order directing judgment to be entered in accordance with the conclusions expressed in said order, with the understanding that several counsel had in their oral statements to the court intended that the issues involved should be submitted to the court upon the complaint and answers filed, notwithstanding that motions to strike had been interposed on behalf of the defendants. The court now being advised that such was not the intent of the stipulation, orders that the order of court as made on the 31st day of December, 1934, be and it is vacated and set aside. The court now orders that the motion of William C. McDuffie, as Receiver of Pan American Petroleum Company and of Richfield Oil Company of California, and the motion of Pan American Petroleum Company to strike from the complaint of plaintiff certain portions thereof, be and they are denied. An exception is noted in favor of the moving defendants. Further action of the court will await such stipulation as the parties may desire to make respecting the submission of the cause on the complaint and answers made thereto.

Dated January 16, 1935.

Wm. P. James
U. S. District Judge.

[Endorsed]: Filed Jan. 16, 1935.

[Title of Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT

TO THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff and to JOSEPH V. KLINE and CLARENCE M. HANSON, its solicitors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendants William C. McDuffie, as Receiver of Richfield Oil Company of California and Pan American Petroleum Company will on Monday the 21st day of January 1935, at 10:00 A. M., or as soon thereafter as the counsel can be heard, in the Court Room of the above entitled Court presided over by the Honorable Wm. P. James in the Federal Building in the City of Los Angeles, State of California, move for judgment on the Pleadings on file herein.

Said Motion will be based upon the Complaint for Declaratory Judgment on file herein and upon the Answers of defendants William C. McDuffie, as Receiver of Richfield Oil Company of California and Pan American Petroleum Company, and upon the basis of the Points

and Authorities set forth in the Brief of said defendants on file herein.

DATED: Los Angeles, California, January 18th, 1935.

GIBSON, DUNN & CRUTCHER

By Homer D Crotty

Solicitors for Defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

Clayton T. Cochran

Solicitor for defendant Pan American Petroleum Company

Notice Accepted and consent given to hearing on Jan. 21, 1934

Joseph V. Kline and
Clarence M. Hanson,

solicitors for plaintiff.

[Endorsed]: Filed Jan. 18, 1935.

[Title of Court and Cause.]

MOTION FOR JUDGMENT

NOW COME the defendants William C. McDuffie, as Receiver of Richfield Oil Company of California and Pan American Petroleum Company and move the Court that judgment be made and entered herein, in favor of these defendants and that it be adjudged and decreed:

1. That the Act of Congress of March 3, 1893, as amended by the Act of Congress of June 19, 1934 (being title 28 Section 847 of the United States Code), said amendment of June 19, 1934, being hereinafter referred to as the "Appraisal Amendment", applies to a public judicial sale of any and all of the Pan American Petroleum Company assets within the jurisdiction of this Court, whether constituting personal property or real estate or interests in land, and that said Appraisal Amendment requires the appointment by this Court of appraisers to appraise all of such assets before the date of the sale thereof and that such sale of said assets, even if determined by this Court to be otherwise fair and equitable, may validly be confirmed only in the event the provisions of said "Appraisal Amendment" are complied with prior to such sale.

2. That the meaning of the term "appraised value" in said Appraisal Amendment is the value of the assets to be sold considered as a "going concern" with a view to the financial returns which might be obtained from the prop-

erty through the uses to which it is being devoted or to which it may be devoted.

3. That the Appraisal Amendment is constitutional as applied to the sale of real estate or interests in land and other assets of Pan American Petroleum Company sold at judicial sale in the Consolidated Foreclosure Causes and in the Constituent Causes, described and referred to in the Pleadings herein.

The foregoing Motion is based upon the plaintiff's Complaint for Declaratory Judgment on file herein and the Answers of these defendants on file herein, and upon the Points and Authorities set forth in the Brief of these defendants on file herein.

DATED: Los Angeles, California, January 18, 1935.

GIBSON, DUNN & CRUTCHER
By Homer D. Crotty

Solicitors for defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

Clayton T. Cochran

Solicitor for defendant Pan American Petroleum Company

[Endorsed]: Filed Jan. 18, 1935.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles. California, on Friday, the 25th day of January, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: WM. P. JAMES, District Judge.

The Chase National Bank of the City of)
New York, Plaintiff,)
vs.) No. Eq.-419-J.
)
Pan American Petroleum Company et al.,)
Defendants.)

The Motion of defendants Wm. C. McDuffie, as Receiver of the Richfield Oil Company of California, and Pan American Petroleum Company, that judgment be made and entered herein in favor of these defendants, pursuant to Notice and Motion filed January 18th, 1935, having been brought on for hearing pursuant to said Notice to the plaintiff, and at the time of the hearing of said Motion the plaintiff presented orally its Motion to submit the cause on the Bill of Complaint and the Answers as filed; and it was stipulated by counsel in open court that both Motions might be deemed submitted to

the Court for decision, and it was so ordered. It was first indicated by counsel that a written order would be presented in that behalf, but respective counsel later waived presentation of such written order and consented to the submission as orally agreed upon in open court. It is now ordered that said both Motions be and they are submitted to the Court for decision.

The Court having duly considered the said Motions, and the law, and now being fully advised, hands down and orders filed its Opinion and Order, and in accordance therewith, orders judgment in favor of the plaintiff. Exception is noted in favor of all interested parties. Filed Opinion and Order.

The said Opinion is ordered entered as the Findings of Fact and Conclusions of Law required under Equity Rule 70½.

A Decree in favor of the plaintiff, signed by the Court on January 24, 1935, is now ordered filed and entered herein; said Opinion and Order, and Decree, as filed, being as follows, to-wit:

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff,	)	
vs.	)	No. Eq-419-J.
PAN AMERICAN PETROLEUM COMPANY, WILLIAM C. McDUFFIE, as Receiver of Pan American Petroleum Company, and WILLIAM C. McDUFFIE, as Receiver of Richfield Oil Company of California, Defendants.	)	OPINION AND ORDER

The plaintiff, Chase National Bank of the City of New York, co-trustee with Bank of America named in an indenture made providing first mortgage security for an issue of $10,441,400 bonds of Pan American Petroleum Company, brings this suit for declaratory relief (Sec. 400, Title 28, U. S. C.)

William C. McDuffie as Receiver of Richfield Oil Company, and defendant Pan American Petroleum Company first filed motions to strike out certain allegations contained in plaintiff's complaint, which motions were heretofore denied. The same defendants filed answers, admitting substantially all facts alleged by the plaintiff, and William C. McDuffie as Receiver of Pan American Petroleum Company, in his answer raised no issue as to

matters of fact alleged by the plaintiff. Defendant McDuffie as Receiver of Richfield Oil Company, together with defendant Pan American Petroleum Company, brought on for hearing after due notice to the plaintiff, their motion for judgment on the pleadings. At the time of the hearing of said motion the plaintiff presented orally its motion to submit the cause on the bill of complaint and the answers as filed. It was stipulated by counsel in open court that both motions might be deemed submitted to the court for decision, and the order was so made. It was first indicated by counsel that a written order would be presented in that behalf, but respective counsel later waived presentation of such written order and consented to the submission as orally agreed upon in open court. IT IS NOW ORDERED that both motions as above described be and they are submitted to the court for decision.

Upon the admitted facts, it is made plain that there is a present, actual controversy between the plaintiff and the defendants in the meaning of the staute authorizing the proceeding for declaratory relief, and that a declaratory judgment is necessary to be made, otherwise there is danger of irreparable losses and delays to the parties to the controversy with respect to the receivership proceedings pending in court and described in plaintiff's complaint. Reference is here made to the facts as pleaded, and it will be unnecessary to include a detailed statement of such facts in this opinion. In that behalf it is ordered that this opinion, as expressing the findings and conclusions of the court, considering in connection therewith the facts admitted and as expressed in the pleadings, shall constitute the findings of the court in this matter.

The point in question is whether by the amendment to Section 847, Title 28, U. S. C., adopted by Congress and approved on June 19, 1934, property sold at public sale under order or decree of a United States Court, must have returned a sum not less than two-thirds of the value as shown by an appraisement made by three appraisers appointed by the court,—regardless of whether the property is real or personal.

Prior to the amendment, Section 847 (applying to real property) read as follows:

847. Sales; real property under order or decree. All real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises as the court rendering such order or decree of sale may direct.

Section 848, following, provided that court sales of personal property should be under the same procedure unless "in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner."

Prospective sales of both Pan American and Richfield properties to satisfy bonded debts are under consideration, foreclosure proceedings having been instituted. The question presented is of vital moment in both proceedings.

Section 847, as it is now in force, with the amendatory provision, is as follows:

"All real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city

in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct: Provided, however, That the court may, upon petition therefor and a hearing thereon after such notice to parties in interest as said court shall direct, if it find that the best interests of said estate will be conserved thereby, order and decree the sale of such real estate or interest in land at private sale: Provided, further, That the court shall appoint three disinterested persons to appraise said property, and said sale shall not be confirmed for less than two-thirds of the appraised value.

Does the final clause, providing for the appointment of appraisers, and denying the right of the court to approve the sale unless the bid amounts to two-thirds of the appraised value, affect public and private sales alike, or only private sales?

The petitioner asserts that where public sales are made such is not the requirement. It is further asserted that if such is the requirement, the amendatory provisions are unconstitutional as to it, as depriving the bondholders of a vested right which had accrued prior to the date of the amendment.

A quite elementary rule of statutory interpretation is that the true intent of Congress must be ascertained, and that that intent must prevail, unless the particular wording of the statute under consideration requires a different construction.

A careful reading of the amenement in connection with the original and unchanged wording of the statute, makes it seem that an interpretation should be adopted which agrees with the petitioner's argument. The original stat-

ute (847) is not changed in its verbiage. There is added a proviso which allows sales of property to be privately made, which had not theretofore been permitted in any case where real property was involved. The rule remains general that such sales shall be publicly held with advertised notice for not less than four weeks. If, in the amended form, at the end of the expressions of the original statute there had been placed a period instead of a colon, there would have been left no room for debate whatsoever as to the meaning intended, to-wit: distinct and separate procedure in the case of private sales. Nevertheless, the form of punctuation is not controlling to the opposite view here expressed. That Congress intended to authorize private sales under court orders to be made only under the restrictive conditions as to appraisement and confirmation of not less than two-thirds of the appraised value, leaving the general provision for public sales unaffected, seems fairly apparent. Why should it have been considered that the procedure outlined and established for public sales of property, with wide and general advertisements as to time and place of sale, needed any further added restrictive conditions? The legislatures of the states have generally determined that public advertised judicial sales are designed to best prevent unfair advantage to be taken by the creditors as against the debtor. Exceptional cases, depending upon the class of property involved, and the dearth of bidders in the particular market, suggest that the canvassing of the interested public, using time and effort in solicitation of offers, may produce better results. In such cases, while private sales are authorized, Congress determined that there should be some cautionary limitation, which would prevent

perhaps only a nominal price to be returned and approved. Hence the conditions that there should be a fair appraisement made and not less than two-thirds of the appraised price accepted and confirmed.

What has been stated demonstrates, I think, that at best there is here present a subject for scant debate as to what Congress intended by its amendment to Section 847. In such cases courts may resort to the records of the Congress, particularly the reports of its committees, in ascertaining the true intent of the law. By reference to such reports we find that the only subject contemplated to be covered by the amendatory provisions, was the private as distinguished from the public sale of property under control of the court.

In Report No. 818, headed "Private Sale of Real Estate," Senator Stephens of the Committee on Judiciary of the Senate, submitted a recommendation for the passage of the bill embodying the amendment, with the statement: "A sufficient explanation of this proposed legislation is contained in the following excerpt from House Report No. 978, which accompanied the Bill in the House of Representatives." The matter referred to as contained in the House Report showed that the amendatory bill in its original form contained no condition as to appraisement of property. This was added by the House Committee amendment. The House Report, referred to by Senator Stephens of the Senate Judiciary Committee, was as follows:

The purpose of this bill is to amend the existing law so as to permit the private sale of real estate under the Federal equity jurisdiction. Under the existing law there is no such right. Experience has shown that a private

sale can be effected more advantageously than a public one, particularly in equitable receiverships where the property is apt to be sacrificed. A person who wishes to buy will not make a genuine bid unless there is competition, when he may be compelled to pay a reasonable price. There is frequently no such competition and, as a result, the property is sacrificed at public sale. A private sale would give an opportunity for negotiation in which a fair price can probably be obtained.

Your committee has amended the bill in order further to protect the property by providing that the court shall appoint three disinterested persons to appraise the property and that the sale shall not be confirmed for less than two thirds of its appraised value.

It seems most clear from this that there was no intent of Congress to have applied to public advertised sales of property made under judicial order or decree, the restrictive provisions contained in the amendment. That the whole purpose and intent was, for the first time to allow private sales to be made of real property under conditions as stated, appears without room for substantial question. The language of the amendment, and its relation to the original text makes this conclusion logical; the report of the Senate Committee confirms it.

The plaintiff petitioner will have judgment accordingly. It view of the conclusions stated, it will be unnecessary to determine the Constitutional question presented. An exception will be noted in favor of all interested parties.

Dated this 24th day of January, 1935.

Wm. P. James
U. S. District Judge.

[Endorsed]: Filed Jan. 25, 1935.

At a Term of the United States District Court for the Southern District of California, Central Division, in the Ninth Judicial Circuit held in the City of Los Angeles, State of California, on the 24th day of January, 1935.

PRESENT:

Honorable Wm. P. James, Judge.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff,	
-against-	IN EQUITY
PAN AMERICAN PETROLEUM COMPANY, WILLIAM C. McDUFFIE, as Receiver of Pan American Petroleum Company, and WILLIAM C. McDUFFIE, as Receiver of Richfield Oil Company of California, Defendants.	CAUSE No. 419-J DECREE

This cause came on to be further heard at this Term on a motion for judgment by the defendants, Pan American Petroleum Company (hereinafter referred to as "Pan American") and William C. McDuffie, as Receiver of Richfield Oil Company of California, on the plaintiff's Bill of Complaint for Declaratory Judgment and the Answers of the defendants, Pan American, William C. McDuffie, as Receiver of Pan American, and William C. McDuffie, as Receiver of Richfield Oil Company of California (hereinafter referred to as "Richfield"), and on

oral motion by plaintiff to submit the cause on the bill and answers, and was argued by counsel, Joseph V. Kline and Clarence M. Hanson appearing as solicitors for the plaintiff, Homer D. Crotty appearing as solicitor for the defendants, William C. McDuffie, as Receiver of Pan American and William C. McDuffie, as Receiver of Richfield, and Clayton T. Cochran appearing as solicitor for the defendant, Pan American; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED, DECREED AND DECLARED as follows:

1. That this Court has jurisdiction of all of the parties hereto and of the subject matter hereof.

2. That a present, actual and justiciable controversy exists between the plaintiff herein and the defendants Pan American and William C. McDuffie, as Receiver of Richfield with regard to the interpretation and the applicability of the appraisal provision of Section 847 of Title 28 of the United States Code as amended, to the public judicial sale of the assets of Pan American to be held in the Consolidated Foreclosure Cause and its constituent causes pursuant to a decree heretofore submitted and to be entered therein by this Court; that the interests of said parties in this proceeding are substantial and adverse; and that this Court has jurisdiction under the provisions of Section 274D of the Judicial Code (Section 400 of Title 28 of the United States Code) to grant a declaratory judgment as prayed for herein.

3. That to the extent that a discretion is lodged in this Court to entertain this suit this Court expressly declares that it should and it does hereby exercise that discretion and declares the rights of the parties hereto as hereinafter set forth.

4. That the provision of Section 847 of Title 28 of the United States Code, as amended, requiring the Court to appoint three (3) disinterested appraisers and prohibiting confirmation of a sale for less than two-thirds of the appraised value, applies only to private sales and does not apply to properties sold at public sale under an order or decree of this or any other United States Court regardless of whether the property to be sold is personal property, real estate or interests in land.

5. That the provision of Section 847 of Title 28 of the United States Code, as amended, requiring the Court to appoint three (3) disinterested appraisers and prohibiting the confirmation of a sale for less than two-thirds of the appraised value applies only to private sales and does not apply to the public judicial sale of any or all of the Pan American assets within the jurisdiction of this Court, whether constituting personal property, real estate or interests in land, to be held in the Consolidated Foreclosure Cause and its constituent causes pursuant to the decree now submitted and to be entered therein by this Court, and that a sale in said causes without an appraisal and at less than two-thirds of the appraised value if otherwise determined by this Court to be fair and equitable may validly be confirmed by this Court, and will be a valid sale and in all respects compliant with the provisions of Section 847 of Title 28 of the United States Code, as amended.

6. That defendants' motion for judgment be denied.

7. That the opinion given by this Court and filed this day may stand as the findings of fact and conclusions of law required under Equity Rule 70½.

8. To all of which the defendants, Pan American Petroleum Company, and William C. McDuffie, as Receiver of Richfield Oil Company of California, except, and exception is hereby accordingly allowed.

Dated: January 24, 1935.

Wm P. James
United States District Judge.

Approved as to form, as required by Rule 44:

GIBSON, DUNN & CRUTCHER
By Homer D. Crotty
Solicitors for defendant William C. McDuffie, as Receiver of Pan American Petroleum Company

GIBSON, DUNN & CRUTCHER
By Homer D. Crotty
Solicitors for defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

MUDGE, STERN, WILLIAMS & TUCKER
FRESTON & FILES
By Clarence M. Hanson
Solicitors for Plaintiff

Clayton T. Cochran
Solicitor for defendant Pan American Petroleum Company

Decree entered and recorded Jan. 25 1935

R. S. ZIMMERMAN,
Clerk,
By Murray E. Wire,
Deputy Clerk.

[Endorsed]: Filed Jan. 25, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

THE CHASE NATIONAL BANK)
OF THE CITY OF NEW YORK,)
)
Plaintiff,)
)
vs.) No. Eq-419-J
)
PAN AMERICAN PETROLEUM) PETITION
COMPANY, WILLIAM C. McDUFFIE, as Receiver of Pan American) FOR
Petroleum Company, and WILLIAM) APPEAL
C. McDUFFIE, as Receiver of Richfield Oil Company of California,)
)
Defendants.)

To the Honorable Wm. P. James, Judge of the United States District Court in and for the Southern District of California, Central Division:

William C. McDuffie, as Receiver of Richfield Oil Company of California and Pan American Petroleum Company, your petitioners, who are defendants in the above entitled cause, pray that they may be permitted to take an appeal from the decree entered in the above cause on the 25th day of January 1935, to the United States Cir-

cuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and further pray that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioners further pray that an order be made waiving the filing by your petitioners of security on such appeal in accordance with the duly signed stipulation for the waiver thereof, which is filed herewith.

DATED this 26th day of January 1935.

GIBSON, DUNN & CRUTCHER
By Homer D. Crotty

Solicitors for Defendant William C. McDuffie, as Receiver of *Rich-* Oil Company of California.

Clayton T. Cochran
Solicitor for Pan American Petroleum Company.

David P. Evans
Of Counsel

[Endorsed]: Filed Jan. 26, 1935.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California, defendants in the above entitled action, and file the following Assignment of Errors upon which they are relying in the prosecution of the appeal herewith petitioned for in said cause from the decree of this Court entered on the 25th day of January, 1935;

1. The Court erred in decreeing that an appraisal as provided for in Section 847, Title 28 of the United States Code, adopted by Congress and approved June 19, 1934, of the real estate and interests in land of Pan American Petroleum Company is not a prerequisite to the valid public sale thereof and to a valid confirmation thereof.

2. The Court erred in failing to decree that Section 847, Title 28 of the United States Code adopted by Congress and approved on June 19, 1934, is valid and constitutional as applied to the sale either publicly or privately of the real estate and interests in land of Pan American Petroleum Company.

3. The Court erred in failing to decree that the appraisal required by Section 847, Title 28 of the United States Code adopted by Congress and approved June 19, 1934, should be made on the basis of a "going concern" with a view to the financial returns which might be obtained from the property being appraised through the uses to which it is being devoted or to which it may be devoted.

4. The Court erred in decreeing that the provisions of Section 847, Title 28 of the United States Code adopted

by Congress and approved June 19, 1934, did not require the Court to appoint three (3) disinterested appraisers and did not prohibit the confirmation of a sale for less than two-thirds (2/3rds) of the appraised value of any or all of the assets of Pan American Petroleum Company located within the jurisdiction of said Court, whether constituting personal property, real estate or interests in land.

WHEREFORE, these defendants pray that the said Decree may be reversed and that it be decreed that the appraisal contemplated by Section 847, Title 28 of the United States Code adopted by Congress and approved June 19, 1934, is an essential prerequisite to the valid sale and to a valid confirmation of the sale, either publicly or privately, of any of the real estate and interests in land of Pan American Petroleum Company, and that said Section 847 so adopted and approved is valid and constitutional as applied to the sale of said real estate and interests in land, and that the appraisal required by said Section 847 is an appraisal based upon the "going concern" value of the property appraised, and for such other and further relief as to the Court may seem just and proper.

DATED: January 26, 1935.

GIBSON, DUNN & CRUTCHER
By Homer D. Crotty

Solicitors for Defendant William C. McDuffie, as Receiver of Richfield Oil Co*k*pany of California.

Clayton T. Cochran

Solicitor for Pan American Petroleum Company.

David P. Evans
Of Counsel

[Endorsed]: Filed Jan. 26, 1935.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the petition of William C. McDuffie, as Receiver of Richfield Oil Company of California and Pan American Petroleum Company for an appeal from the decree in the above entitled cause and upon consideration of the Assignment of Errors filed herewith,

IT IS HEREBY ORDERED that the appeal herein be allowed as prayed for; and

IT IS FURTHER ORDERED that a certified transcript of the record and of all proceedings be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and

IT IS FURTHER ORDERED that in pursuance of the stipulation waiving security filed herewith no bond or security on this appeal, either for costs or otherwise, shall be required.

DATED: this 26 day of January, 1935.

Wm. P. James

Judge of the United States District Court, Southern District of California, Central Division.

[Endorsed]: Filed Jan. 26, 1935.

[TITLE OF COURT AND CAUSE.]

STIPULATION

IT IS HEREBY STIPULATED by and between the solicitors for the respective parties hereto that no bond or undertaking on the part of the defendants William C. McDuffie, as Receiver of Richfield Oil Company of California and Pan American Petroleum Company herein, on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit be required; and that an order may be entered herein to that effect without further notice.

DATED this 26 day of January 1935.

MUDGE, STERN, WILLIAMS & TUCKER
FRESTON & FILES

By Clarence M. Hanson

Solicitors for Plaintiff

GIBSON, DUNN & CRUTCHER

By Homer D. Crotty

Solicitors for Defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

Clayton T. Cochran

Solicitor for Defendant Pan American Petroleum Company.

David P. Evans
Of Counsel

[Endorsed]: Filed Jan. 26, 1935.

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Due service of the hereinafter designated papers is hereby admitted this 26 day of January, 1935:

1. Assignment of Errors
2. Petition for Appeal
3. Order granting Appeal

MUDGE, STERN, WILLIAMS & TUCKER
FRESTON & FILES

By Clarence M. Hanson

Solicitors for Plaintiff

[Endorsed]: Filed Jan. 26, 1935.

[Title of Court and Cause.]

PRAECIPE ON APPEAL FROM DECREE OF DECLARATORY JUDGMENT

TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU ARE HEREBY requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following and no other papers, to-wit:

1. Complaint for Declaratory Judgment

2. Answer of William C. McDuffie, as Receiver of Richfield Oil Company of California

3. Answer of defendant Pan American Petroleum Company

4. Answer of defendant William C. McDuffie, as Receiver of Pan American Petroleum Company

5. Notice of Motion of defendant William C. McDuffie, as Receiver of Richfield Oil Company of California to strike from the Complaint herein certain portions thereof.

6. Notice of Motion of defendant Pan American Petroleum Company to strike from the Complaint herein certain portions thereof.

7. Motion of defendant William C. McDuffie, as Receiver of Richfield Oil Company of California to strike from the Complaint herein certain portions thereof.

8. Motion of defendant Pan American Petroleum Company to strike from the Complaint herein certain portions thereof.

9. Stipulation providing for submission of Motions to Strike for decision without argument

10. Order of the Honorable William P. James dated November 2, 1934 for the submission for decision of Motions to Strike by defendants Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California.

11. Order of the Honorable William P. James dated January 16, 1935, denying Motions to Strike

12. Notice of Motion of defendants Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California for judgment, and endorsements thereon

13. Motion for Judgment of defendants Pan American Petroleum Company and William C. McDuffie, as Receiver of Richfield Oil Company of California

14. Minutes of Clerk of Court dated January 25, 1935, Judge James

15. Opinion and Order of the Honorable William P. James dated January 24, 1935

16. Decree made under date of January 24, 1935 and entered under date of January 25, 1935

17. Petition for Appeal, and order allowing Appeal

18. Assignment of Errors

19. Stipulation waiving bond on appeal

20. Citation on Appeal, and endorsements thereon

21. Acknowledgment of Service of (1) Assignment of Errors (2) Petition for Appeal (3 Order allowing Appeal

22. Praecipe, and endorsements thereon.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within the time and in the manner required by law and the rules of the Court.

DATED this *30st* day of January 1935.

GIBSON, DUNN & CRUTCHER

By Homer D. Crotty

Solicitors for Defendant William C. McDuffie, as Receiver of Richfield Oil Company of California.

Clayton T. Cochran

Solicitor for Defendant Pan American Petroleum Company

David P. Evans
Of Counsel

[Endorsed]: Service of foregoing praecipe and receipt of copy is hereby acknowledged this 30th day of January, 1935. Clarence M. Hanson Solicitor of record for Plaintiff Filed Jan. 31, 1935.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 81 pages, numbered from 1 to 81 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer of William C. McDuffie, as Receiver of Richfield Oil Company of California; answer of Pan American Petroleum Company; answer of William C. McDuffie, as Receiver of Pan American Petroleum Company; notice of motion and motion to strike from complaint by William C. McDuffie, as Receiver of Richfield Oil Company of California; notice of motion and motion to strike from complaint by Pan American Petroleum Company; stipulation and order providing for submission of motions to strike for decision without argument; order of January 16, 1935, denying motions to strike; notice of motion and motion for judgment; order of January 25, 1935, ordering judgment in favor of plaintiff; opinion and order; decree; petition for appeal; assignment of errors; order allowing appeal; stipulation waiving bond; acknowledgment of service of appeal papers, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that

the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to................ and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this................ day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-five, and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7805

United States
Circuit Court of Appeals

For the Ninth Circuit.

Joseph B. O'Neil, AS RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SACRAMENTO,

Appellant,

vs.

FRANK P. WILSON,

Appellee.

Transcript of Record

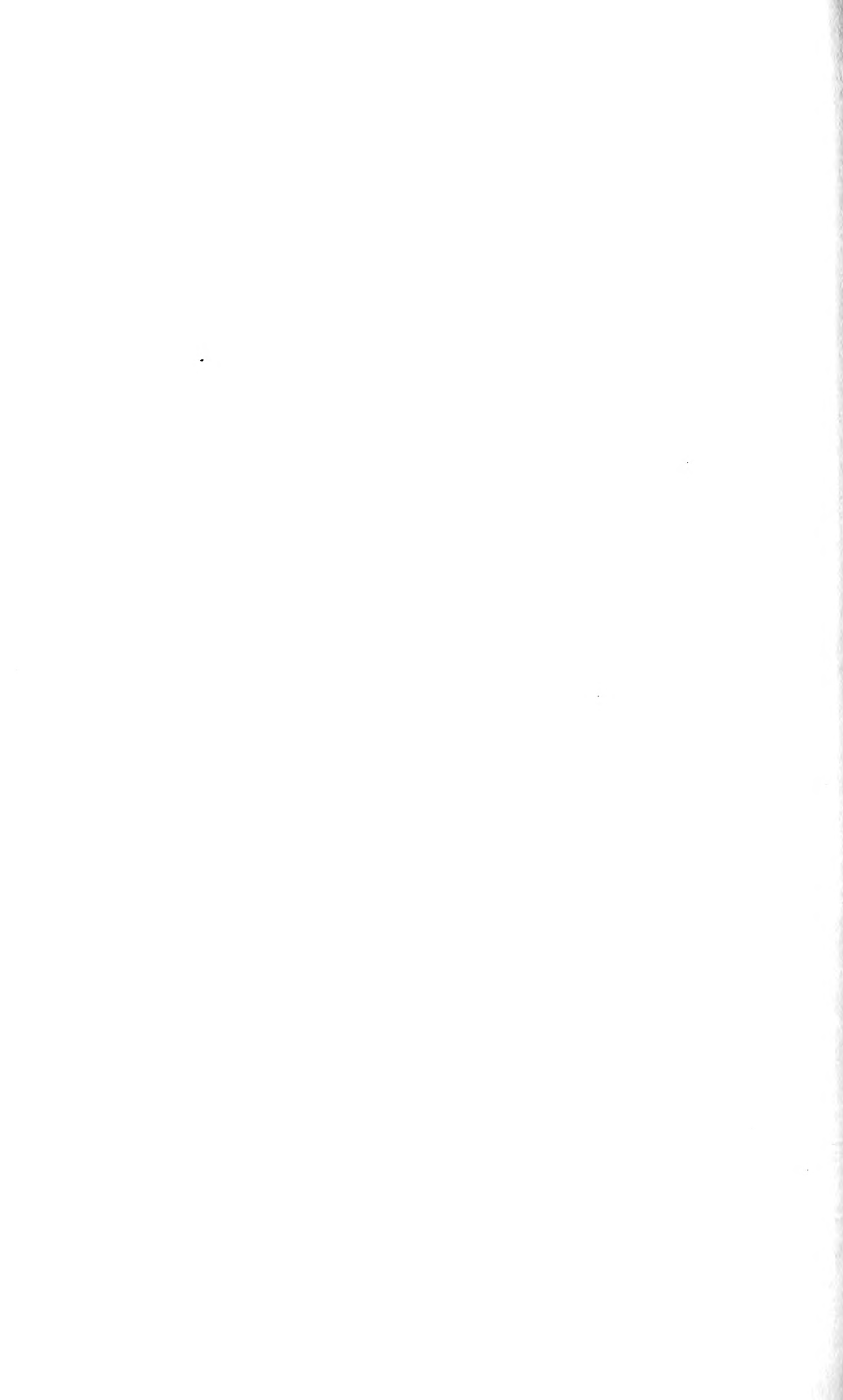
Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

FILED

APR - 8 [illegible]

PAUL P. O'BRIEN,

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA



No. 7805

United States

Circuit Court of Appeals

For the Ninth Circuit.

H. W. DOUGLASS, AS RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SACRAMENTO,

Appellant,

vs.

FRANK P. WILSON,

Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellant:

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GERALD R. JOHNSON, Esq.

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Sacramento, Calif.

Attorneys for Appellee:

H. B. SEYMOUR, Esq.

DOWNEY, BRAND & SEYMOUR, Esqs.

Capital National Bank Bldg.,

Sacramento, Calif.

In Equity No. 1163-S

In the United States District Court for the Northern District of California, Northern Division.

H. W. DOUGLASS, AS RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SACRAMENTO,

Appellant,

vs.

FRANK P. WILSON,

Appellee.

COMPLAINT.

Plaintiff complaining alleges:

I.

That at all times herein mentioned The California National Bank of Sacramento has been and now is a National Banking Association organized and existing under and by virtue of the laws of the United States and at all times herein mentioned prior to January 21st, 1933, engaged in business as a National Bank at its principal place of business in the City of Sacramento, County of Sacramento, State of California. That on said January 21st, 1933, said The California National Bank of Sacramento failed to open for business and closed its doors by resolution of its Board of Directors. That on said day The Comptroller of the Currency of the United States duly and regularly declared said corporation to be insolvent and for the purpose of winding up its affairs as provided by law, took possession of all of its assets and took charge of

all of its business and affairs, and on said January 21st, 1933, duly and regularly appointed defendant, H. W. Douglas, as Receiver of said Bank. That said defendant thereupon duly qualified as such Receiver and thereupon took charge of all of the assets, business and affairs of said Bank and at all times since said appointment and qualification said defendant has been and now is the duly appointed, qualified and acting Receiver of said Bank, and as such, and at all of said times, has been and now is in possession of all of said assets, business and affairs and engaged in the winding up and liquidation thereof. [1]*

II.

That said defendant is a citizen and resident of the County of Sacramento, State of California, and within the territorial jurisdiction of the above entitled court and *and* northern division thereof. That plaintiff is a citizen and resident of the City of New York, County of New York, State of New York.

III.

That this action is designed to establish priority in right to assets of said The California National Bank of Sacramento, in the hands of defendant, as such Receiver aforesaid, and as such is an action involved in the winding up of the affairs of said Bank, original jurisdiction to hear and determine which is vested by statute in District Courts of the United States.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

IV.

That at all times herein mentioned California Trust and Savings Bank has been and now is a corporation organized and existing under and by virtue of the laws of the State of California, and at all times herein mentioned prior to January 21st, 1933, engaged in the business of banking at its principal place of business in the City of Sacramento, County of Sacramento, State of California. That on said January 21st, 1933, and contemporaneously with the closing of said The California National Bank of Sacramento, said California Trust and Savings Bank suspended operations by reason of its insolvency. That continuously for many years prior and up to the date of said simultaneous suspension aforesaid, each of said institutions were conducted and operated in and occupied the same banking premises [2] in the City of Sacramento, State of California. That at all of said times all of the subscribed and issued capital stock of California Trust and Savings Bank was owned and held by The California National Bank of Sacramento in trust for the stockholders of said National Bank. That at all of said times the respective Boards of Directors of each institution were composed of the same individuals. That at all of said times the executive and administrative officers of each institution were the same individuals. That at all of said times A. B. Carter was the duly appointed, qualified and acting Vice-President and Cashier of California Trust and Savings Bank and

lifewise at all of said times was the duly appointed, qualified and acting Cashier of The California National Bank of Sacramento. That at all of said times Henry M. Weston was a duly appointed, qualified and acting Vice-President of each institution.

V.

That continuously since October 15th, 1932, plaintiff has been and now is the owner of all that certain real property situated in the City of Sacramento, County of Sacramento, State of California, more particularly described as follows:

> The East ¼ of Lot 3, and the West ¼ of Lot 4 of the Block bounded by K and L and 7th and 8th Streets, of said City of Sacramento, according to the official map or plan thereof.

VI.

That plaintiff's immediate predecessor in interest in the ownership of said property was Mary Bovie Wilson, formerly known as Mary Bovie. That the said Mary Bovie Wilson is the wife of plaintiff. That on the 8th day of August, 1928, the said Mary Bovie Wilson borrowed of and from California Trust [3] and Savings Bank the sum of One Hundred Twenty Thousand Dollars ($120,000.00) and as evidence thereof and on said date made, executed and delivered to said California Trust and Savings Bank her promissory note in the principal amount of One Hundred Twenty Thousand Dollars ($120,000.00) and for

the purpose of securing the payment of same made, executed and delivered to A. B. Carter and H. M. Weston, as trustees of said California Trust and Savings Bank, a deed of trust upon the real property above described, which deed of trust was duly acknowledged and thereafter recorded in the office of the County Recorder of said Sacramento County in Book 199 of Official Records, at page 226. That on October 15, 1932, the balance remaining due on account of the principal of said promissory note aforesaid, was the sum of One Hundred Ten Thousand Dollars ($110,000.00).

VII.

That immediately upon acquisition by plaintiff of the ownership of said real property, plaintiff together with the said Mary Bovie Wilson, made, executed and entered into an agreement in writing with the said California Trust and Savings Bank whereunder and whereby said California Trust and Savings Bank agreed to renew said loan upon said property in the sum of One Hundred Twenty Thousand Dollars ($120,000.00) (an advance of Ten Thousand Dollars ($10,000.00)) for an additional period of five years beyond its then due date providing, among other things, plaintiff would forthwith expend the sum of between Forty Thousand Dollars ($40,000.00) and Fifty Thousand Dollars ($50,000.00) in making improvements upon said property and providing further that plaintiff would forthwith deposit with said California Trust and Savings Bank the sum of at least Thirty five Thou-

sand Dollars ($35,000.00) as a fund out of which the cost, in part, of said improvements would be defrayed and as a guarantee of such payment.

VIII.

That pursuant to said agreement and in conformity [4] therewith plaintiff forthwith commenced the construction of the requisite improvements upon said property and under date of October 21st, 1932, transmitted to said California Trust and Savings Bank by letter from New York City, his check in the sum of Thirty Five Thousand Dollars ($35,000.00) for deposit in said California Trust and Savings Bank, all as provided by said agreement, said letter of enclosure containing and stating with respect to said deposit the following:

> "I enclose herewith my check for $35,000. which is to be collected and deposited with you and used in the payment of improvements made upon the property 722-24 K Street as work done under the terms of the contracts is certified to you by John Leete, the supervising architect.
>
> "This deposit is made with you for this specific use and for no other purpose."

IX.

That upon receipt of said check, California Trust and Savings Bank stated and declared that inasmuch as said Bank did not afford checking facilities for its depositors, it would cause said deposit to be made in the name of plaintiff in The Cali-

fornia National Bank of Sacramento under the terms and conditions stated in plaintiff's letter of October 21st, 1932, aforesaid. That thereupon said California Trust and Savings Bank caused to be deposited in The California National Bank of Sacramento in plaintiff's name the proceeds of said check amounting to the sum of Thirty Five Thousand Dollars ($35,000.00) and said deposit was duly and regularly accepted by said The California National Bank of Sacramento under and pursuant to the terms of plaintiff's letter of October 21st, 1932, said deposit being [5] opened under the name and designation "Frank P. Wilson, Special Account, 50 Broadway, New York City, New York". That the assets of said The California National Bank of Sacramento were thereby augmented and increased in the amount of said proceeds, to wit, in the sum of Thirty Five Thousand Dollars ($35,000.00).

X.

That all negotiations with plaintiff and the said Mary Bovie Wilson with respect to said agreement and deposit aforesaid were conducted on behalf of each of said Banks by the officials and each of them above named, to wit, A. B. Carter and Henry M. Weston, and at the time of the making of said deposit of Thirty Five Thousand Dollars ($35,000.00) in plaintiff's name in said The California National Bank of Sacramento, said officials and each of them were fully cognizant of the terms and conditions under which said sum was trans-

mitted by plaintiff for deposit and said officers and each of them, on behalf of said The California National Bank of Sacramento, duly and regularly accepted said deposit in accordance with said terms.

XI.

That on the date of suspension of said The California National Bank of Sacramento, there remained unexpended in said account, a balance of Thirteen Thousand Four Hundred Twenty Nine and 60/100ths Dollars ($13,429.60). That at said time, the improvements on said real property, agreed to be constructed by plaintiff as aforesaid, were then in course of construction, and said deposit was being employed by plaintiff, pursuant to the terms of said agreement, in payment and discharge of the costs thereof. That since the suspension of said Banks on said date, the construction of the improvements so agreed to be constructed on said real property has been completed, all in accordance with [6] said agreement, and plaintiff has laid out and expended since said date and in order to effect said completion a sum greatly in excess of the amount of the balance of the deposit remaining in said The California National Bank of Sacramento on the date of its suspension.

XII.

That at all times since the date of the augmenting of the assets of said The California National

Bank of Sacramento by the amount of said deposit aforesaid and up to and including the date of said suspension, to wit, January 21st, 1933, there was on hand in cash in said bank an amount in excess of the balance due from time to time on account of plaintiff's deposit, including the amount due thereon on said date of closing, namely, Thirteen Thousand Four Hundred Twenty Nine and 60/100ths Dollars ($13,429.60), and an amount in excess of the balance due, during said period, on all deposits of a similar character.

XIII.

That following defendant's appointment as Receiver aforesaid and within the time and in the manner provided by statute in such case made and provided, plaintiff duly and regularly presented to and filed with defendant as such Receiver, his verified claim in writing whereunder and whereby, plaintiff claimed said sum of Thirteen Thousand Four Hundred Twenty Nine and 60/100ths Dollars ($13,429.60) as a preferred claim and entitled to priority in payment as herein set forth, which claim set forth and contained the terms and conditions under which said deposit was made, all as averred herein. That thereafter and on July 22nd, 1933, said claim was rejected by The Comptroller of the Currency of the United States and by defendant as such Receiver aforesaid with [7] notification to plaintiff that the same would be allowed as a general claim only.

XIV.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays the judgment and decree of this Court as follows:

1. That an accounting be had of the assets, business and affairs of said The California National Bank of Sacramento, and that defendant be required to so account, to the extent of determining all facts and circumstances appropriate to a determination of the issues involved herein; that said accounting include, in addition to any and all facts and circumstances otherwise appropriate, (a) a determination of the amount of cash on hand in said Bank at all times between the date of plaintiff's deposit, to wit, October 21st, 1932, and to and including the date of the closing of said institution, to wit, January 21st, 1933, and (b) a determination of the aggregate amount of all deposits, during said period, of a character similar to plaintiff's together with the amount of all increases therein and withdrawals therefrom.

2. That an appropriate decree be made and entered herein impressing upon the assets of said Bank on date of closing and possession of which was taken by defendant, as such Receiver, a trust, preference and priority in plaintiff's favor in the sum of Thirteen Thousand Four Hundred Twenty Nine and 60/100th Dollars ($13,429.60) and adjudging that defendant, as such receiver, holds said sum of Thirteen Thousand Four Hundred Twenty

Nine and 60/100ths Dollars ($13,429.60) as trustee for plaintiff [8] and requiring payment of the amount of same forthwith to plaintiff.

3. In the event it is adjudicated that such trust, preference and priority in plaintiff's favor does not exist as to the whole of said amount, that such relief be nevertheless granted as to such portion thereof as to which such trust, preference and priority is decreed to exist and that such decree declaring such partial trust be entered without prejudice to plaintiff's right to a general claim against said Receivership for any balance of sum and that as to said balance it be decreed that plaintiff has a general claim therefor, payable by defendant to plaintiff as such.

4. In the event it is adjudicated that such trust, preference and priority in plaintiff's favor does not exist as to any portion of said amount, that such decree be made and entered without prejudice to plaintiff's right to a general claim against said receivership and that it be decreed that plaintiff is entitled to such general claim and that said sum is payable by defendant to plaintiff as such.

5. For such further and additional relief as to the Court may seem meet and proper.

Dated: October 6th, 1933.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct 6 1933. [9]

[Title of Court and Cause.]

ANSWER.

Answering the complaint herein, defendant alleges:

A.

That the complaint herein does not state facts sufficient to entitle plaintiff to the relief sought or to any relief and does not state facts sufficient to constitute a valid cause of action in equity—in this that it appears from the allegations of the complaint that the deposit mentioned therein was not impressed with a trust or that said deposit was other than an ordinary deposit made in the ordinary course of business obtaining in the ordinary business of banks and created only the relation of debtor and creditor, and said complaint states no facts sufficient to entitle plaintiff to a preference over other depositors and creditors of said The California National Bank of Sacramento; and by reason of the foregoing deficiencies plaintiff ought not to be allowed to maintain this suit and said suit should be dismissed with costs to defendant.

B.

And not waiving the foregoing objection but at all times insisting thereon, defendant for a Second Answer to the complaint admits, denies and alleges, as follows, that is to say,

I.

Defendant admits all the allegations contained in Paragraph I of the complaint.

II.

Defendant admits all the allegations contained in Paragraph II of the complaint.

III.

Defendant admits all the allegations contained in Paragraph III of the complaint. [10]

IV.

Referring to the allegations contained in Paragraph IV of the complaint: defendant alleges that he is without knowledge as to whether or not the board of directors of the California Trust and Savings Bank and of The California National Bank of Sacramento were at any time composed of the same individuals; and is without knowledge as to whether or not the executive or administrative *offces* of the said institution were at any time the same individuals; and is without knowledge as to whether or not A. B. Carter or H. M. Weston was at any time a Vice President or Cashier of the California Trust and Savings Bank; and is without knowledge whether or not at all of said times all of the subscribed and issued capital stock of California Trust and Savings Bank was owned and held by The California National Bank of Sacramento in trust for the stockholders of said national bank; and

Defendant admits all the remaining allegations of said Paragraph IV.

V.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations contained in Paragraph V of the complaint.

VI.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations contained in Paragraph VI of the complaint.

VII.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations as contained in Paragraph VII, of the complaint.

VIII.

Defendant alleges that he is without knowledge as to any of the matters, things or allegations as contained in Paragraph VIII of the complaint.

[11]

IX.

Referring to the allegations contained in Paragraph IX of the complaint defendant denies that the deposit of Thirty-five Thousand ($35,000.00) Dollars mentioned in said paragraph was made, or caused to be made by California Trust and Savings Bank, and denies that said deposit was accepted by said The California National Bank of Sacramento under or pursuant to the terms of any letter and denies that it was accepted under or in pursuance of any agreement, arrangement or understanding whatsoever save and except the usual and customary

agreement obtaining in cases of ordinary deposits in banks—and in that regard plaintiff alleges that said deposit of Thirty-five Thousand ($35,000.00) Dollars was none other than an ordinary deposit in bank and created only the relation of debtor and creditor between said bank and plaintiff; and defendant denies that the assets of said bank were augmented or increased in any amount by said deposit.

Defendant admits the remaining allegations of said Paragraph IX of the complaint.

X.

Defendant alleges that he is without knowledge as to any of the matters, things, or allegations contained in Paragraph X of the complaint.

XI.

Referring to the allegations contained in Paragraph XI of the complaint, defendant admits that on the date of the suspension of said The California National Bank of Sacramento there remained unexpended in the account of plaintiff the sum of Thirteen Thousand Four Hundred Twenty-nine and 60/100ths ($13,429.60) Dollars; and defendant alleges that he is without knowledge as to any other matters, things or allegations contained in said Paragraph XI of the complaint. [12]

XII.

Referring to the allegations contained in Paragraph XII of the complaint; defendant admits that

at all times since the making of said deposit and up to and including January 21, 1933 (date of suspension of said bank) there was on hand in said bank an amount in excess of the balance due from defendant on account of plaintiff's deposit, including the balance due thereon at said date of closing, namely, Thirteen Thousand Four Hundred Twenty-nine and 60/100th ($13,429.60) Dollars; but defendant denies that there was at any time on hand in cash any amount in excess of the balance due, during said period or at any other time, on all deposits of similar character to that of the deposit to the credit of plaintiff as aforesaid.

XIII.

Defendant admits the allegations contained in Paragraph XIII of the complaint, except that defendant denies that said deposit was made or accepted on any of the terms set forth in said claim.

C.

And for a Third Answer to said complaint, defendant alleges:

That on, to-wit, October 27, 1932, one S. S. Ruttenberg was the agent of plaintiff, and on said date he deposited with and in said The California National Bank of Sacramento the personal check of plaintiff drawn on Manufacturers Trust Company, New York for Thirty-five Thousand ($35,000.00) Dollars, and directed that same be placed to the credit of "Frank P. Wilson, Special Account, #50 Broadway, New York, N. Y." [13]

That said check was received by said bank and credited on the books of said bank as so directed as aforesaid, and said direction was the only direction given to, and the only understanding, agreement or terms on which said deposit was delivered to or accepted by said The California National Bank of Sacramento; and said deposit is the only deposit at any time made for or by plaintiff. Said deposit was made in the ordinary course of the banking business, and was at all times subject to be drawn out on checks signed by plaintiff, for which purpose plaintiff, in accordance with the customary requirements of banks, furnished his signature card as Frank P. Wilson, attaching thereto his address as being 50 Broadway, New York City, N. Y.:

That at divers and sundry times since the making of said deposit various sums were drawn out of same by or for plaintiff, on checks signed "Frank P. Wilson" and no sums were drawn therefrom save and except by checks signed by said Frank P. Wilson.

That said deposit was not impressed with a trust and was none other than an ordinary deposit creating the relation of debtor and creditor; and that The California National Bank of Sacramento had no notice or knowledge of any facts or circumstances showing or tending to show that said deposit was other than an ordinary deposit subject to check and creating only the relation of debtor and cred-

itor usually obtaining between a bank and its ordinary and general depositors.

Wherefore having fully answered, defendant prays to be hence dismissed with his reasonable costs and disbursements.

HINSDALE, OTIS & JOHNSON,
Sacramento, California
Attorneys for Defendant.

[Endorsed]: Filed Nov 15 1933. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday, the 13th day of March, in the year of our Lord one thousand nine hundred and 34.

PRESENT: The Honorable A. F. ST. SURE, District Judge.

No. 1163-S

FRANK P. WILSON,

vs.

H. W. DOUGLASS, as Receiver of the California National Bank of Sacramento.

This cause came on this day for trial. H. B. Seymour, Esq., appearing as attorney for plaintiff and Gerald R. Johnson and R. W. Jennings, Esqrs., appearing as attorneys for the defendant. Mr. Seymour made a statement to the Court on behalf of the plaintiff. Henry Weston and Stanford S. Ruttenberg were sworn and testified on behalf of

plaintiff. Plaintiff introduced in evidence and filed plaintiff's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9, and the plaintiff rested. Mr. Johnson made a motion for non-suit on behalf of the defendant, which said motion was ordered denied. Henry M. Weston was recalled and Darwin A. Sherwin were sworn and testified on behalf of the defendant. Defendant introduced in evidence and filed defendant's exhibits marked A, B, *c* and D. Ordered that the further trial hereof be continued to March 14, 1934 at 10 o'clock A. M. [15]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and 34.

PRESENT: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the trial hereof was resumed. Henry M. Weston and Darwin A. Sherwin were re-called and Wilbur D. Polk and J. E. Dyer were each sworn and testified on behalf of the defendant. Stanford S. Ruttenburg was re-called *bu* defendant for further cross-examination and further testified on behalf of plaintiff. Plaintiff introduced in evidence and filed plaintiff's exhibits Nos. 10 and 11. After hearing the attorneys, it is ordered that this cause

be submitted upon briefs to be filed in 15, 10 and 10 days from and after the filing of certain depositions to be taken on behalf of the respective parties. [16]

[Title of Court and Cause.]

MOTION OF DEFENDANT FOR FINDINGS AND JUDGMENT.

Comes now defendant, at the close of the evidence herein, and moves the court to find from the evidence:

I.

That the deposit of funds mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. F. Ruttenberg) and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the terms and conditions of an ordinary and general deposit in a commercial bank.

II.

That there never was any agreement or understanding between plaintiff and The California National Bank of Sacramento that the deposit of funds referred to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said Bank.

III.

That at the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had become a part of, the general assets of said bank and subject [17] to the check of said depositor as in the case of ordinary deposits in commercial banks.

And to hold that on the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought or to any relief, and the Bill of Complaint should be dismissed with costs.

Dated: April 16, 1934.

HINSDALE, OTIS & JOHNSON
Attorneys for Defendant.

Copy received this 16th day of April, 1934.

DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

[Endorsed]: Filed Apr 16, 1934. [18]

[Title of Court and Cause.]

ORDER.

After full consideration, it is

ORDERED that a decree be entered herein in favor of plaintiff as prayed for in his bill of com-

plaint, particularly in accordance with paragraph two of the prayer, together with interest and costs.

Findings of fact and conclusions of law to be prepared in accordance with Rule No. 42 of this court.

Dated: November 16, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Nov 16 1934. [19]

[Title of Court and Cause.]

REQUEST OF DEFENDANT FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Above named defendant requests the Court to make Findings and Conclusion as follows, viz:

I.

That the deposit of funds mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. S. Ruttenberg) with The California National Bank of Sacramento and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the terms and conditions of an ordinary and general deposit in a commercial bank.

II.

That there never was any agreement or understanding between plaintiff and The California National Bank of Sacramento that the deposit of funds referred to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said bank or was not to be used by said bank in the general and usual conduct of its business as a commercial bank.

III.

That at the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had [20] become a part of, the general assets of said bank and subject to the check of said depositor as in the case of ordinary deposits in commercial banks.

IV.

That the said The California National Bank of Sacramento was a national bank and the California Trust and Savings Bank was a state bank and said two banks were entirely separate and distinct corporate entities, and as to the deposit in question in this suit said banks had no privity of contract or of interest with each other.

V.

That said The California National Bank of Sacramento had no notice or knowledge of any agree-

ment or understanding between plaintiff and the said California Trust and Savings Bank that the deposit involved in this suit was a special deposit or was impressed with any trust whatsoever.

And to hold that on the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought or to any relief, and the Bill of Complaint should be dismissed with costs.

Dated: November 22, 1934.

HINSDALE, OTIS & JOHNSON
Attorneys for Defendant.

Copy received and service accepted this 22nd day of November, 1934.

DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

[Endorsed]: Filed Nov 22 1934. [21]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on March 13, 1934, before the Court sitting without a jury, H. B. Seymour, Esq., and Messrs. Downey, Brand & Seymour appearing on behalf of plaintiff, and defendant appearing with and by his counsel Gerald R. Johnson, and evidence both oral and documentary having been introduced and the case argued by respective counsel and the cause

submitted to the Court for decision, the Court now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That on January 21, 1933, and for many years prior thereto The California National Bank of Sacramento was and had been a National Banking Association engaged in the banking business in the City of Sacramento, State of California. That on said date it suspended business by reason of insolvency and defendant, H. W. Douglass, took possession of all of its assets and took charge of all of its business and affairs as Receiver of said Bank, duly appointed as such by The Comptroller of the Currency of the United States, and ever since said time the said H. W. Douglass has been and now is in possession of all of said assets, business and affairs and engaged, as such Receiver, in the winding up and liquidation thereof. [22]

II.

That plaintiff is a citizen and resident of the City of New York, County of New York, State of New York; that defendant is a citizen and resident of the County of Sacramento, State of California, and within the territorial jurisdiction of the Court and the Northern Division thereof. That this action is designed to establish priority in right to assets of said The California National Bank of Sacramento in the hands of defendant as such Receiver

and as such is an action involved in the winding up of the affairs of said Bank, original jurisdiction to hear and determine which is vested by statute in District Courts of the United States.

III.

That on January 21, 1933, and for many years prior thereto, California Trust and Savings Bank was and had been a banking corporation organized and existing under and by virtue of the laws of the State of California and engaged in the banking business in the City of Sacramento. That on said date and contemporaneously with the closing of said The California National Bank of Sacramento, said California Trust and Savings Bank likewise suspended operations by reason of its insolvency. That continuously for many years prior and up to the date of said simultaneous suspension aforesaid, each of said institutions were conducted and operated in and occupied the same banking premises in the City of Sacramento, State of California. That at all of said times all of the subscribed and issued capital stock of California Trust and Savings Bank was held in trust for the stockholders of said National Bank. That at all of said times the respective Boards of Directors of each institution were composed of the same individuals. That at all of said times the [23] executive and administrative officers of each institution were the same individuals. That at all of said times A. B. Carter was the duly appointed, qualified and acting Vice-President and Cashier of California Trust and

Savings Bank and likewise at all of said times was the duly appointed, qualified and acting Cashier of The California National Bank of Sacramento. That at all of said times Henry M. Weston was a duly appointed, qualified and acting Vice-President of each institution.

IV.

That continuously since October 15, 1932, plaintiff has been and now is the owner of all that certain real property situated in the City of Sacramento, County of Sacramento, State of California, more particularly described as follows:

> The East ¼ of Lot 3, and the West ¼ of Lot 4 of the Block bounded by K and L and 7th and 8th Streets, of said City of Sacramento, according to the official map or plan thereof.

V.

That plaintiff's immediate predecessor in interest in the ownership of said property was Mary Bovie Wilson, formerly known as Mary Bovie. That the said Mary Bovie Wilson is the wife of plaintiff. That on the 8th day of August, 1928, the said Mary Bovie Wilson borrowed of and from California Trust and Savings Bank the sum of One Hundred Twenty Thousand Dollars ($120,000.00) and as evidence thereof and on said date made, executed and delivered to said California Trust and Savings Bank her promissory note in the principal amount of One Hundred Twenty Thousand Dollars

($120,000.00) and for the purpose of securing the payment of same made, executed and delivered to A. B. Carter and [24] H. M. Weston, as trustees of said California Trust and Savings Bank, a deed of trust upon the real property above described, which deed of trust was duly acknowledged and thereafter recorded in the office of the County Recorder of said Sacramento County in Book 199 of Official Records, at page 226. That on October 15, 1932, the balance remaining due on account of the principal of said promissory note aforesaid, was the sum of One Hundred Ten Thousand Dollars ($110,000.00).

VI.

That immediately upon acquisition by plaintiff of the ownership of said real property, plaintiff, together with the said Mary Bovie Wilson, made, executed and entered into an agreement in writing with the said California Trust and Savings Bank whereunder and whereby said California Trust and Savings Bank agreed to renew said loan upon said property in the sum of One Hundred Twenty Thousand Dollars ($120,000.00) (an advance of Ten Thousand Dollars ($10,000.00)) for an additional period of five (5) years beyond its then due date providing, among other things, plaintiff would forthwith expend the sum of between Forty Thousand Dollars ($40,000.00) and Fifty Thousand Dollars ($50,000.00) in making improvements upon said property and providing further that plaintiff would forthwith deposit with said California Trust

and Savings Bank the sum of at least Thirty-five Thousand Dollars ($35,000.00) as security in favor of said Bank and as a guarantee that said improvements would be constructed as promised.

VII.

That pursuant to said agreement and in conformity therewith, plaintiff forthwith commenced the construction of the requisite improvements upon said property. That on October 21, 1932, and for the purpose of providing said security aforesaid, and as [25] a guarantee that said improvements would be constructed as promised, plaintiff transmitted to said California Trust and Savings Bank the sum of Thirty-five Thousand Dollars ($35,000.00) which amount was received and accepted by said bank upon the understanding, and said bank thereupon agreed with plaintiff, that said amount was remitted by plaintiff as security only; that said remittance was not to be employed by said bank for its own purposes; and that the only and specific use to be made of said amount, and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the cost of said improvements, and not otherwise.

VIII.

That immediately upon receipt of said sum of Thirty-five Thousand Dollars ($35,000.00) and by mutual agreement between plaintiff, California Trust and Savings Bank and The California National Bank of Sacramento, said fund was act-

ually deposited in plaintiff's name with The California National Bank of Sacramento and that at all times The California National Bank of Sacramento was fully cognizant of all of the terms, agreements, conditions, covenants and agreements of the parties in respect to said fund and its purpose and of all limitations in respect to its use and accepted said deposit upon said terms and each and all of them, and promised and agreed with plaintiff that said amount was transmitted by plaintiff and was received and accepted by said The California National Bank of Sacramento for the purpose of security only; that said fund was not to be employed by said The California National Bank of Sacramento for its own purposes; and that the only and specific use to be made of said fund, and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the cost of said [26] improvements and not otherwise. That by said agreement the parties intended to and did make and constitute The California National Bank of Sacramento trustee of said fund and a trust in the amount of said deposit was created by the parties by the terms and provisions of said understanding, and under said trust the use of said fund was restricted to the specific uses stated herein.

IX.

That the assets of said The California National Bank and the assets of said Bank coming into the hands of defendant as Receiver of said Bank, were

augmented and increased by the amount of said deposit, to-wit, by the sum of Thirty-five Thousand Dollars ($35,000.00).

X.

That on the date of the suspension of The California National Bank of Sacramento, to-wit, on January 21, 1933, the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) remained unexpended in said fund and that all amounts expended from said fund prior to such suspension were employed in accordance with the terms of said agreement of guarantee, to-wit, said funds were applied on account of the cost of said improvements. That on the date of said suspension said improvements were in course of construction and that since said time plaintiff has completed said improvements, all in accordance with his agreement, and plaintiff has laid out and expended since said date and in order to effect said completion, a sum greatly in excess of the amount of the balance of said fund remaining in said The California National Bank of Sacramento on the date of its suspension. That plaintiff has in all respects otherwise duly performed all obligations of every kind and character on his part to be observed, kept and performed in favor of said Californis Trust and Savings Bank and The California National Bank of [27] Sacramento and defendant, H. W. Douglass, as such Receiver.

XI.

That at all times since the date of the augment-

ing of the assets of said The California National Bank of Sacramento by the amount of said deposit aforesaid and up to and including the date of said suspension, to-wit, January 21, 1933, there was on hand in said bank an amount in excess of the unexpended balance from time to time of said deposit of Thirty-five Thousand Dollars ($35,000.00), including the unexpended balance thereof, on said date of closing, namely, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,-429.60) and that at all of said times there was in addition thereto an amount on hand in cash in excess of the balance due during said period on all deposits in said bank of a similar character. That included in the assets which came into defendant's hands, as such Receiver, was said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) and said assets so coming into said defendant's hands were received by him subject to a trust therein in plaintiff's favor for the full unexpended balance of said sum of Thirty-five Thousand Dollars ($35,000.00), to-wit, Thirteen Thousand, four hundred Twenty-nine and 60/100ths Dollars ($13,429.60) and said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) has in all respects been traced into the hands of defendant as such Receiver.

XII.

That following defendant's appointment as Receiver aforesaid and within the time and in the

manner provided by statute in such case made and provided, plaintiff duly and regularly presented to and filed with defendant as such Receiver, his [28] verified claim in writing whereunder and whereby plaintiff claimed said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths ($13,-429.60) as a preferred claim and entitled to priority in payment, which claim set forth and contained the terms and conditions under which said deposit was made, all as found herein. That thereafter and on July 22, 1933, said claim was rejected by The Comptroller of the Currency of the United States and by defendant as such Receiver aforesaid, with notification to plaintiff that the same would be allowed as a general claim only.

XIII.

That plaintiff has no plain, speedy or adequate remedy at law.

XIV.

That all of the allegations of plaintiff's complaint in this action, in respect to which no specific finding is made in the foregoing, are and each of them is true. That all of the allegations of defendant's answer inconsistent with or contrary to these findings are and each of them is untrue.

CONCLUSIONS OF LAW.

As conclusions of law, from the foregoing findings of fact the Court finds:

1. That The California National Bank of Sac-

ramento received said sum of Thirty-five Thousand Dollars ($35,000.00) in trust and not otherwise and said Bank was not authorized to use said amount or any part thereof for its own purposes; that the assets of said Bank were augmented in the sum of Thirty-five Thousand Dollars ($35,000.00) by reason of said deposit and the unexpended balance thereof, to-wit, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60), has been [29] followed and traced into defendant's hands as Receiver, and the assets of said bank which came into defendant's hands as such Receiver were received by him subject to said trust in plaintiff's favor in the amount of said unexpended balance, to-wit, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60).

2. That plaintiff is entitled to a decree impressing a trust, preference and priority in plaintiff's favor in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) upon the assets of said Bank in defendant's hands, as Receiver, and adjudging that defendant holds the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) as trustee for plaintiff and that plaintiff is entitled to payment of said sum forthwith and accordingly that plaintiff have judgment against defendant in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60.100ths Dollars ($13,429.60) in

lawful money of the United States, together with his costs of suit.

That a decree be entered accordingly.

Dated: December 10, 1934.

A. F. ST. SURE

Judge.

[Endorsed]: Filed Dec 10 1934. [30]

In the District Court of the United States, in and for the Northern District of California, Northern Division.

In Equity No. 1163-S

FRANK P. WILSON,

Plaintiff,

vs.

H. W. DOUGLASS, as Receiver of THE CALIFORNIA NATIONAL BANK OF SACRAMENTO,

Defendant.

DECREE.

The above entitled cause came on regularly for trial, and proofs of the respective parties having been presented and the cause having been argued and submitted and duly considered, and Findings of Fact and Conclusions of Law having been duly made and entered herein,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) That there be and is hereby impressed in plaintiff's favor upon the assets of The California National Bank of Sacramento, a corporation, coming into the hands of defendant H. W. Douglass as Receiver of said Bank, a trust, preference and priority in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60).

(a) That defendant holds the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/-100ths Dollars ($13,429.60) as trustee for plaintiff and that plaintiff is entitled to the payment of said sum forthwith.

(3) That plaintiff do have and recover from defendant, as Receiver of said The California National Bank of Sacramento, a corporation, the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60), together with his costs of court herein taxed in the sum of $59.47.

Dated: Dec. 10, 1934.

A. F. ST. SURE

Judge

[Endorsed]: Filed and entered Dec. 10, 1934. [31]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

BE IT REMEMBERED that the above entitled

cause came on to be tried on the 13th day of March, 1934, before Hon. A. F. St. Sure, one of the Judges of the above entitled court. Plaintiff was represented by his attorneys, Messrs. Downey, Brand and Seymour, and by H. B. Seymour, Esq., and defendant by his attorneys, Messrs. Hinsdale, Otis and Johnson, and Gerald R. Johnson, Esq. The issue to be tried was whether or not plaintiff was entitled to have it adjudged that his claim for the balance of a deposit made by him in The California National Bank of Sacramento was entitled to payment in full at the hands of defendant (receiver of said bank), in priority over the claims of general creditors of said bank. The evidence introduced at the trial was as follows, to-wit:

PLAINTIFF'S CASE

H. M. WESTON,

called by Plaintiff, testified as follows:

My name is Henry M. Weston, I was formerly connected with the California Trust and Savings Bank and The California National Bank of Sacramento, in the capacity of Vice President of both institutions; and at present I am assisting in the liquidation of the California Trust and Savings Bank. The administrative and executive officers and directors of both institutions were the same; the California Trust and Savings Bank and The California National Bank of Sacramento occupied

(Testimony of H. M. Weston.)

the same banking premises—they were located in this city at 7th and J Streets.

The stock of the California Trust and Savings Bank was held in trust for the stockholders of The California National Bank of Sacramento.

What I have said relates to the makeup of the banks and was true in October, 1932, and at the time when the said banks closed, towit, on January 21, 1933. Witness identifies [32] and authenticates letter of date November 17, 1932, from Mary Wilson to California Trust and Savings Bank. Letter marked for identification, Plaintiff's Exhibit No. 1.

SANDFORD S. RUTTENBERG,

called by Plaintiff, testified as follows:

I reside at Madison, Wisconsin; am a real estate broker and builder; I know Frank Wilson, plaintiff in this case, also his wife, Mary Wilson. I was employed by Mr. Wilson and Mrs. Wilson to come out to Sacramento, California, and interview the California Trust and Savings Bank regarding an extension and renewal of a mortgage; the California Trust and Savings Bank were holders of a mortgage in the amount of $110,000.00 on Mrs. Wilson's Sacramento property, and it was just about due and payment had been demanded. I arrived in Sacramento in the early part of October, 1932. Prior to the time I arrived in Sacramento I had conducted negotiations in Wilson's behalf

(Testimony of Sandford S. Ruttenberg.)
relative to an extension of this obligation but with no success. At that time a lease had been negotiated with respect to the Wilson property in Sacramento—a lease with W. T. Grant Company of Massachusetts, the company which is now occupying the premises—the property is 722-24 K Street.

When I arrived at Sacramento I called at the bank upon Mr. Weston, with whom I had negotiated by letter and by telegram, and I explained that I decided to come to California to see if we could not reach some agreement as to a renewal of that mortgage, and I then explained to Mr. Weston that I had negotiated a 30-year lease with the W. T. Grant Company of Massachusetts, a very substantial company, and that if the bank would consent to a renewal of the mortgage for five years and lend an additional $10,000.00, Mr. Wilson was agreeable to erecting a new building on the site and that he would be glad to assign the lease [33] to the bank as further security for the loan. Mr. Weston informed me that he would be glad to present the matter to the Executive Committee, or, rather, to the Financial Committee and give me a decision.

The next morning I went with several members of that committee, along with Mr. Weston, and we came to a tentative agreement as to what the bank would do. Mr. Weston then drafted and handed me a letter setting out what that agreement was.

(Testimony of Sandford S. Ruttenberg.)

PLAINTIFF'S EXHIBIT NO. 2 is the letter referred to and reads as follows:

"CALIFORNIA TRUST AND SAVINGS BANK
Head Office 7th and J Streets
Commercial—Savings—Trust
Capital Stock Owned by the Stockholders of The California National Bank of Sacramento
Sacramento, California
October 18, 1932

Branches
Arbuckle Branch
Arbuckle, California
Ione Branch
Ione, California
Loomis Branch
Loomis, California
North Sacramento Branch
North Sacramento

Mrs. Mary Wilson
c/o Frank P. Wilson
50 Broadway
New York, N. Y.

Dear Mrs. Wilson:

This is to advise you that we have this date arrived at an agreement with your representative, Mr. Rutenberg, to the effect that we will renew your present loan of $110,000.00, secured by certain property in this city, for the sum of

(Testimony of Sandford S. Ruttenberg.)

$120,000.00, with interest at 6% per annum, payable monthly for a period of five years, with the understanding that improvements costing between $40,000.00 and $50,000.00 are to be made on said property between now and January 15, 1933, and that the premises securing the loan are to be leased to the W. T. Grant Co. for a period of thirty years for a rental of $18,000.00 per year, made payable in installments of $1500.00 per month, and that said lease is to be assigned to this bank, and all payments accruing thereunder are to be made direct to this bank and disbursed as follows:—

"1. Payment of interest.

"2. Not less than the sum of $833.33 per month to be paid on principal and the balance to be remitted to you or your order; said payments to continue for the first twelve months or until the sum of $10,000.00 has been paid on the principal of said note. [34]

Thereafter, we are to accept said rentals, deducting therefrom monthly, the amount of accrued interest, plus a minimum of $500.00 on the principal and accounting to you, or your order, for the balance.

"It is further understood that the sum of at least $35,000.00, together with the increased $10,000.00 arising from our new loan, is to be deposited in this bank for the purpose of payment of improvements to be made on the property in question.

(Testimony of Sandford S. Ruttenberg.)

"It is understood that the new loan is to be made in your name and the name of Frank P. Wilson.

"It is understood and agreed that the present loan is to be extended until the completion of the present alteration program, which will be on or about January 20th, 1933.

"It is further understood that the above agreement shall not become effective until all alterations and improvements of every kind and character whatsoever shall have been paid for. The $10,000.00 increase in loan to be deposited in escrow with the title company after thirty-five days recorded notice of completion has expired.

"Very truly yours,

(Signed) "A. B. CARTER,
Vice President and Cashier."

STIPULATED that by deed dated October 15, 1932, Mrs. Wilson conveyed this property to her husband, Frank P. Wilson, plaintiff herein.

And WITNESS, resuming, said:

At the time I received this letter of October 18, the improvements on the property consisted of a two story building with two stores downstairs and some offices upstairs. Before the letter of October 18th was handed to me, I had let a contract to a Los Angeles firm and had instructed them to start demolition of the improvements and demolition had started.

(Testimony of Sandford S. Ruttenberg.)

I forwarded this letter by air mail to Frank P. Wilson at New York. I received from Mr. Wilson a reply to this letter, and along with Mr. Wilson's said reply-letter was a check for $35,000.00 PLAINTIFF'S EXHIBIT NO. 7 is a copy of the said letter from Mr. Wilson and is as follows: [35]

"FRANK P. WILSON
Attorney at Law
Specialist - Customs Practice
50 Broadway
New York

Bert Hanson of Counsel

Telephone DIgby 4-7792
Cable Address "Franwilso"

October 21, 1932

California Trust and Savings Bank,
7th & J Streets,
Sacramento, California.

Gentlemen: Att: Mr. A. B. Carter.

"I have your letter of the 18th instant addressed to Mrs. Mary Wilson, in my care, stating that on that day you had arrived at an agreement with Mr. Ruttenberg, representing us, to the effect that you would renew Mary Wilson's present loan of $110,-000. secured on certain property in your city for the sum of $120,000., with interest at 6 per cent per annum payable monthly for a period of five years, with the understanding that improvements costing between $40,000. and $50,000. are to be made on said property between said date and January 15,

(Testimony of Sandford S. Ruttenberg.)
1933 and that the premises securing the loan are to be leased to W. T. Grant Co. for a period of thirty years, for a rental of $18,000. per year, made payable in installments of $1,500. per month, and that said lease is to be assigned to your bank and all payments accruing thereunder are to be made direct to your bank and disbursed as follows:

"1. Payment of interest

"2. Not less than the sum of $833.33 per month to be paid on principal and the balance to be remitted to Mary Wilson, or her order; said payments to continue for the first twelve months or until the sum of $10,000.00 has been paid on the principal of said note.

"That thereafter you are to accept said rentals, deducting therefrom monthly, the amount of accrued interest, plus a minimum of $500.00 on the principal and account to Mary Wilson, or her order for the balance.

"That it is further understood that the sum of $35,000.00 together with the increased $10,000. arising from your new loan, is to be deposited in your bank for the purpose of payment of improvements to be made on the property in question.

"That it is further understood that the new loan is to be made in the name of Mary Wilson and the name of Frank P. Wilson.

"That it is further understood and agreed that the present loan to Mary Wilson is to be extended until the completion of the present alteration program, which will be on or about January 20, 1933.

[36]

(Testimony of Sandford S. Ruttenberg.)

"That it is further understood that the above agreement shall not become effective until all alterations and improvements of every kind and character whatsoever shall have been paid for. The $10,000.00 increase in loan to be deposited in escrow with the title company after thirty-five days recorded notice of completion has expired.

"We do not quite understand the last sentence in the last paragraph of your letter. We do not see why the $10,000. should be deposited with a title company. Your promise to pay the $10,000. is satisfactory to us. Furthermore we do not see why the payment of $10,000. toward the payment of improvements should be reserved until thirty-five days after recorded notice of completion has expired. It is satisfactory to us that this $10,000. be the last payment upon certified completion of the improvements, but we think it should be available at that time should the same be necessary or convenient.

"The letter otherwise states an agreement which we accept and we hereby make application for the loan signed by Mary Wilson and Frank P. Wilson.

"On October 15, 1932, I purchased this property from Mary Wilson and the deed is now being recorded, Mary Wilson will, however, sign the application for the new loan and the new note and sign all other papers necessary.

"I enclose herewith my check for $35,000. which is to be collected and deposited with you and used in the payment of improvements made upon the

(Testimony of Sandford S. Ruttenberg.)
property 722-24 K Street as work done under the terms of the contracts is certified to you by John Leete, the supervising architect.

"This deposit is made with you for this specific use and for no other purpose.

"The present deed of trust will be satisfied and discharged of record when the new deed of trust is executed and filed, upon the completion of improvements, on or about January 20, 1933.

"*Your* truly,

Frank P. Wilson."

THE ABOVE MENTIONED CHECK was introduced, marked PLAINTIFF'S EXHIBIT NO. 4, and a copy thereof, without the endorsements, is as follows:

No. 2545 New York Oct 21 1932
MANUFACTURERS TRUST COMPANY 1-30
149 Broadway
PAY TO THE ORDER OF California Trust and Savings Bank $35000xx
Thirty five thousand xx DOLLARS
FRANK P. WILSON
Special [37]

WITNESS resumes: On October 27, 1932, I went to the banking premises of the bank with the letter and the check—this was the date on which the deposit was opened. I walked up to Mr. Weston's desk and handed him the check and the letter

(Testimony of Sandford S. Ruttenberg.)

and said "Here it is". Mr. Weston said, "I see you made good" and he looked at the check and said "Pardon me for just a minute", and he walked over to Mr. Skinner on the other side of the bank. Mr. Skinner was the Vice President of both institutions, as I understood it. He spoke with Mr. Skinner for a few minutes and walked over to Mr. Carter's desk. Mr. Carter is also an officer of both institutions. There was rather a lengthy conversation there between Mr. Weston and Mr. Carter. Mr. Weston came back and said that Mr. Carter had requested that they have the bank's attorney come in and correct the ambiguities in the said letter of October 18, 1932, which Mr. Wilson had pointed out in his said letter of October twenty-first—in one paragraph of that letter it states that the $10,000.00 shall be deposited along with the $35,000.00 and in the very next paragraph is says that the $10,000.00 shall go up in escrow with the title company of Sacramento. The attorney came in and he walked over to Mr. Carter's desk, again with Mr. Weston, and they had quite a conversation there. I was on the other side of the bank, of course, and I don't know what took place during that conversation, but after a bit Mr. Johnson, who was the attorney, and Mr. Weston came back to Mr. Weston's desk and they decided to withdraw the original letter and Mr. Johnson dictated another letter in its place, this letter

(Testimony of Sandford S. Ruttenberg.)
marked PLAINTIFF'S EXHIBIT NO. 3 is that letter or a copy thereof and is as follows, viz:

"CALIFORNIA TRUST AND SAVINGS BANK

Head Office 7th and J Streets
Comercial—Savings—Trust
Capital Stock Owned by the Stockholders of
The California National Bank of Sacramento

Sacramento, California [38]

Branches
Arbuckle Branch
Arbuckle, California
Ione Branch
Ione, California
Loomis Branch
Loomis, California
North Sacramento Branch October 27, 1932
North Sacramento

Mrs. Mary Wilson
c/o Mr. Frank P. Wilson
#50 Broadway
New York City, New York

Dear Mrs. Wilson:

"After consultation with Mr. Ruttenberg, we wish to advise that our offer of October 18th, 1932 is hereby withdrawn and in place and stead thereof, the following offer is made you:

"This is to advise you that we have this date arrived at an agreement with your representative,

(Testimony of Sandford S. Ruttenberg.)

Mr. Ruttenberg, to the effect that we will renew your present loan of $110,000.00, secured by certain property in this city, for the sum of $120,000.00 (an advance of $10,000.00), with interest at 6% per annum, payable monthly for a period of five years, with the understanding that improvements costing between $40,000.00 and $50,000.00 are to be made on said property between now and February 25th, 1933, and that the premises securing the loan are to be leased to the W. T. Grant Co. for a period of thirty years for a rental of $18,000.00 per year, made payable in installments of $1,500.00 per month, and that said lease is to be assigned to this Bank, and all payments accruing thereunder are to be made direct to this Bank and disbursed as follows:—

"1. Payment of interest.

"2. Not less than the sum of $833.33 per month to be paid on principal and the balance to be remitted to you or your order; said payments to continue for the first twelve months or until the sum of $10,000.00 has been paid on the principal of said note.

"Thereafter, we are to accept said rentals, deducting therefrom monthly, the amount of accrued interest, plus a minimum of $500.00 on the principal and accounting to you, or your order, for the balance.

"When, as and if the proposed alterations have been fully completed and you and Frank P. Wilson

(Testimony of Sandford S. Ruttenberg.)

have executed to us, a new promissory note in the principal sum of $120,000.00, dated February 25th, 1933, properly secured by a first Deed of Trust on the real property under discussion, said promissory note and Deed of Trust not to become effective until said Deed of Trust is shown by proper title report to be a first lien on the real property under discussion herein, excepting liens for taxes and rights of way heretofore granted [39] to Public Utility Corporations and party wall agreements.

"When we are assured by the Sacramento Abstract and Title Company that the title to said real property is as above specified, then, on or before thirty-five days after Notice of Completion filed in relation to the alterations aforesaid, we will deposit with the Sacramento Abstract and Title Company, payable to your order, the sum of $10,000.00 agreed to be advanced as aforesaid.

"It is understood and agreed that the present loan is to be extended until the completion of the present alteration program, which will be on or about February 25th, 1933.

"You will note that the offer contained in our letter of October 18th, 1932, is identical with the offer contained herein, excepting in the manner in which it is worded. We felt there was some ambiguity in the last paragraph of page one and in the last paragraph of page two in our letter aforementioned.

"Please examine and advise us if satisfactory,

(Testimony of Sandford S. Ruttenberg.)

whereupon we will forward the necessary papers evidencing the new loan in the sum of $120,000.00.

"Very truly yours,

(Signed) "A. B. CARTER,
Vice President and Cashier."

WITNESS resumes: I called Mr. Weston's attention to the fact that in this letter of theirs there was no mention made of that $35,000.00, and he said "As long as you have the check here for $35,000.00, I guess that covers it. You are going to deposit that check?" I said "Yes." Both Mr. Carter and Mr. Weston saw Mr. Wilson's letter of October 21st.

Mr. Weston said he would take me over to a certain gentleman—I cannot recall the name at this time,—and that the money should be deposited in the National bank because the Trust and Savings Bank did not have any facilities for checking accounts.

(STIPULATED that the person referred to by the witness was Mr. Sherwin, and that he was at that time an Assistant Cashier of both the California Trust and Savings Bank and of The California National Bank of Sacramento: Whereupon WITNESS continued as follows:)

I went over to Mr. Sherwin's desk and the account was [40] opened. Mr. Weston introduced me

(Testimony of Sandford S. Ruttenberg.)
to Mr. Sherwin and said, "Mr. Ruttenberg is going to make a deposit here for Mr. Wilson of $35,000.00 covering that loan of ours and Mr. Ruttenberg will give you the details, and you take care of him." I then told Mr. Sherwin I wanted this money in a special deposit in accordance with Mr. Wilson's instructions, and Mr. Sherwin said they had no stamp "Special Deposit" but they had a "Special Account". "Well," I said, "Just so you understand what it is for," and the account was opened.

THE BANK PASS BOOK showing an entry of $35,000.00 marked "Special Account — Frank P. Wilson" was introduced and marked PLAINTIFF'S EXHIBIT 5 and copy is as follows:

"THE CALIFORNIA NATIONAL BANK
SACRAMENTO, CALIFORNIA
SPECIAL ACCOUNT
In Account with Frank P. Wilson
Oct 27 1932 DAS 35000—"

WITNESS, (on being asked if he could enlighten the Court as to the addition of the word "Special" following Mr. Wilson's signature on the check—Exhibit 4—which was deposited) said:

Before I went out to California, Mr. Wilson opened the account on which the said check was drawn, for the purpose of building this building—. and I was to tell the California Trust and Savings Bank, that Mr. Wilson had deposited this money

(Testimony of Sandford S. Ruttenberg.)
in this bank and that they could refer to this bank if they cared to—that the money had been deposited there for that purpose; but this was not satisfactory—Mr. Weston thought the money ought to be put in their bank.

PLAINTIFF'S EXHIBIT NO. 6 was introduced—and WITNESS testified that same is a list of checks drawn by Mr. Wilson on this account taken from his check book stubs in the check book with statement of purpose of checks—said list is as follows: [41]

ITEMIZED LIST OF EXPENDITURES
FRANK P. WILSON $35,000 ACCOUNT

1932			
Nov.	23	S. S. Ruttenberg, disbursements trip to Sacramento, completing contracts, etc.	$ 550.00
"	23	Ed. T. Ryan, 1st installment Sacramento County taxes 1932-33	1,403.60
"	23	C. W. Mier, 1st installment Sacramento City taxes 1932-33	782.07
"	23	Herbert M. Baruch Corporation, General contractor, first payment	4,500.00
Dec.	2	F. H. Reynolds & Co., surveying and foundation soundings	843.30
"	5	Herbert M. Baruch Corporation, second installment general contract	6,300.00

(Testimony of Sandford S. Ruttenberg.)

1932			
Dec.	5	California Trust & Savings Bank, mortgage interest due December 11th	550.00
"	5	S. S. Ruttenberg, expenses and services trip to Sacramento, negotiating building contract, etc.	820.00
"	12	Jack W. Thomas, faithful performance bond and filing fee electrical contract	54.50
"	27	Herbert M. Baruch Corporation, filling in old cesspool	187.00
1933			
Jan.	5	Carpenter & Mendenhall, ventilating contract	3,084.30
"	5	Jack W. Thomas, electrical contract	842.85
"	5	Luppen & Hawley, Inc., plumbing and heating	1,102.50
"	5	California Trust & Savings Bank, mortgage interest	550.00
		TOTAL	$21,570.12

WITNESS testified that the checks for said amounts, respectively, bore the endorsement of the respective payee as above set out, and all of said checks were, and were stamped as having been, paid by The California National Bank of Sacramento.

WITNESS, resuming, said: I am familiar with

(Testimony of Sandford S. Ruttenberg.)

the expenditures made on this account—said list is a correct tabulation of the items of expenditure and what they were for from that account. After I left here I went to New York and Mr. Wilson called my attention to certain items that he wanted to pay and wanted to know if it was all right to check on that account. That was my understanding. I told him it was, and he showed me these checks along with various other checks that from time to time were to be made for payment on account of contracts and various subcontractors as certified by Mr. Leete, who was the superintendent [42] architect of W. T. Grant Company, in charge of construction. I did not fill out the checks myself. I paid no attention to who signed the checks or who drew them. I was only interested in the fact that the checks were pertaining to the building, etc.

Subsequent to the closing of the bank, in completing the improvements upon the property, Mr. Wilson spent a considerable amount in excess of the balance of that deposit. His total outlay for those improvements was about $58,000.00.

THE LETTER which had been identified and authenticated by Mr. Weston and which had been marked for identification, PLAINTIFF'S EXHIBIT NO. 1, was now offered, received in evidence as Plaintiff's Exhibit No. 1, and copy is as follows:

(Testimony of Sandford S. Ruttenberg.)

"FRANK P. WILSON
Attorney at Law
Specialist - Customs Practice
50 Broadway
New York

Bert Hanson of Counsel

Telephone DIgby 4-7792
Cable Address ""Franwilso"

November 17, 1932

California Trust and Savings Bank
Sacramento, California

Gentlemen:

"Your letter of October 27, 1932, containing an offer of extension of mortgage and increase to $120,000. for five years is satisfactory to me. Your letter of October 27th is identical with the offer contained in your letter of October 18, 1932, except that ambiguity in the last paragraph on page one and last paragraph on page two is corrected.

"Please forward the necessary papers evidencing the new loan in the sum of $120,000. for five years, the principal amortized not less than the sum of $833.33 per month for the first year, and not less than $500. per month for the balance of the period. This new promissory note will be signed by me, as well as Frank P. Wilson, the present owner of the property, and will be dated February 25, 1933.

"It is, of course, desired that the $10,000. be

(Testimony of Sandford S. Ruttenberg.)

available to pay for alterations before the time to file liens has begun. I do not believe the building will be entirely completed more than 35 days before February 25, 1933, but if [43] such is a fact I wish the new loan to be advanced, but this is a matter which can be taken up later.

"Yours truly,

"MARY WILSON".

CROSS EXAMINATION

What I have related here this morning was all that transpired at that meeting at the bank and was all that was said.

The last time I saw that letter of October 21 was when I was discussing the matter with Mr. Weston. I left the letter at the bank.

I opened this account in the name of Frank P. Wilson; and all the checks on said account were signed by Mr. Wilson; it was not my understanding that the bank should draw these checks but it was my understanding that the bank was to pass on the checks before they were paid.

I sent the signature card back to Mr. Wilson to be signed, and I sent the pass book along with it. I gave Mr. Sherwin the address of Mr. Wilson to which he was to forward the check book or checks.

Mr. Wilson paid taxes from these funds, and he also paid my expenses from these funds. He paid both the city taxes and county taxes from these funds. He paid my expenses of only one trip from

(Testimony of Sandford S. Ruttenberg.)

these funds, towit: the trip to start the construction of the building; the check of November 23rd was the original check he gave me when I left, and the check of December 5 covered a balance for items I tendered him a statement for after I returned to New York. [44]

Q. There was also paid interest on this account too; you know that, don't you?

A. Yes, sir, interest on this mortgage, I presume you are referring to.

Q. Yes. That is correct.

A. That is right.

Q. On the real property mortgaged.

A. That is right.

Q. Well, now, would this account work this way: Would you tell Mr. Wilson what items to pay?

A. Well, I had arranged with Mr. Leete to certify to me all amounts that were to be paid as the work progressed.

Q. How was that going to improve the bank's position if Mr. Wilson was in New York drawing on this account freely? Now was the bank going to become of knowledge that the architects had certified to the items?

A. Well, I assumed the bank would make whatever arrangements they thought necessary to protect their interests. I was not aware of how the bank was going to protect themselves; I presumed after the $35,000.00 was in there the bank would look after their own interest. I was not concerned with that at all.

(Testimony of Sandford S. Ruttenberg.)

Q. Mr. Wilson was free to draw checks on this account?

A. My understanding was that when the checks came in the bank, before the check would be honored, it was to be understood they were to ascertain for what purpose the money was being paid. I didn't know just exactly how the bank handled their trust funds, nor did I attempt to tell them how to handle their business.

WITNESS resumes:

I took care of all details for Mr. Wilson. [45]

AT THIS POINT THE FOLLOWING STIPULATIONS WERE ENTERED INTO by the counsel for both parties, to-wit:

1. That the $35,000. check which had been introduced in evidence was endorsed by the California Trust and Savings Bank and was deposited in the Frank P. Wilson account as aforesaid; that immediately on the deposit of said $35,000. credit was given to Mr. Wilson in the amount thereof—that is to say, the check was not received for collection merely.

2. That the said check was endorsed by The California National Bank of Sacramento and immediately forwarded to New York by air mail where collection was promptly effected and the proceeds of the check were then credited to the account of The California National Bank in the Chase National Bank in the City of New York, and

(Testimony of Sandford S. Ruttenberg.)

that the Chase National Bank of the City of New York was the New York correspondent of The California National [46] Bank, with whom The California National Bank maintained an account.

3. That Plaintiff's Exhibit 8 is a true and correct transcript of the account of The California National Bank of Sacramento with the Chase National Bank during the entire period commencing with the day the $35,000.00 check was credited to the account and to and including the date of the suspension of The California National Bank: that at the close of business on October 28, there was a credit on the books of the Chase National Bank of New York in favor of The California National Bank of Sacramento of the sum of $82,653.65; that at the close of business on the day on which the $35,000. check was collected, the credit balance in favor of The California National Bank of Sacramento was $101,049.77; that the account of said The California National Bank of Sacramento with the said Chase National Bank of New York thereafter fluctuated and reached a low point on December 28, 1932, of $8,732.84; and on the date of suspension, the balance in said account in favor of The California National Bank of Sacramento was $50,691.28—that the defendant H. W. Douglass, as Receiver of The California National Bank, obtained and took into his possesion cash or cash items equivalent to that amount—and that there was on hand in the vaults of The California National Bank continuously at all times during the period commenc-

(Testimony of Sandford S. Ruttenberg.)

ing with the making of the Deposit of the $35,000. check and up to and including the time **Mr. Doug**lass as Receiver took charge of the assets of the bank an amount in cash in excess of the amount required to pay and discharge any balance of plaintiff's account and any other and all other claims entitled to that for which the plaintiff here contends, namely, priority in payment over general creditors. [47]

4. That plaintiff, Frank P. Wilson, duly filed a claim with the Receiver within the time provided by law and in the proper form, wherein he claimed priority as set forth in this complaint herein.

PLANTIFF RESTS.

DEFENDANT'S CASE

HENRY M. WESTON,

called by defendant testified as follows:

As I recall it, Mr. Ruttenberg stated that Mr. Wilson had sufficient funds on deposit in a New York Bank, which later developed to be the Manufacturers Trust Company—I don't remember of requesting Mr. Ruttenberg to have the funds transferred to The California National Bank. At the time the account was opened I remember that I introduced Mr. Ruttenberg to the gentlemen in the National Bank. One side of the building was devoted to the Trust and Savings Bank, and one side to the National Bank. I escorted Mr. Ruttenberg from the Trust and Savings Bank side to the Na-

(Testimony of Henry M. Weston.)

tional Bank side. I remember very distinctly Mr. Ruttenberg calling at the bank with the check at the time the account was opened and I thought that I took him over to Mr. Carter, the Cashier, but it is possible I took him to Mr. Sherwin who had charge of the new accounts in the bank.

Q. (By the Court) What is a special account?

A. Well, a special account is very often opened,—the same party might have one or more accounts in the bank, one account would be a special account which he would draw against for a specific purpose and designate it as a special account. The bank would have no control over the funds. It would be just his own way of designating that particular account.

The COURT: I understand from Mr. Weston's testimony that you could designate the account most any way you wished, could you not? The Witness: Yes. You might call it "Account No. One" and "Account No. Two", for your own convenience. [48]

The COURT: Yes. And the only reason you used the designated "Special Account" was for that very reason. A. For the reason the depositor requested it.

The COURT: What were the words Mr. Ruttenberg used with reference to that, when he went to the bank? Can you find that, Mr. Reporter? Mr. Ruttenberg: Special deposit.

The COURT: Special deposit, yes. Mr. Ruttenberg said he wished a special deposit and the gentle-

(Testimony of Henry M. Weston.)

man behind the counter told him or suggested it be a special account and Mr. Ruttenberg said he didn't care what they called it so long as he carried out the terms of the agreement, so long as he understood how the deposit was to be received.

WITNESS resumes:

Mr. Ruttenberg called at the bank with the check to open the account. I am speaking of the account in the name of Frank P. Wilson. There were several letters and [49] correspondence regarding the continuation of the indebtedness with the bank with the understanding that this amount of money would be expended for improvements on this particular piece of property, and that if that sum was expended, the bank would grant a further additional advance of $10,000. Yes, I understood that $35,000. was to be used for improvements on the property. This $35,000. was supposed to be used and expended for that purpose by Mr. Wilson.

DARWIN ARTHUR SHERWIN,

called by Defendant testified as follows:

I recall Mr. Ruttenberg calling at my desk at The California National Bank in October of 1932. I had charge of the cards there—the system they employed in making out new deposits—I and other officers. Mr. Ruttenberg opened a deposit in the name of Frank P. Wilson, Special Account. (Witness is here shown a signature card purporting to be the signature card of Frank P. Wilson and it is STIPULATED by plaintiff's counsel that same is

(Testimony of Darwin Arthur Sherwin.)

the genuine signature card of plaintiff and was signed by plaintiff and was sent to The California National Bank of Sacramento as signature to be honored when signed to checks on this account, and is asked by defendant's counsel what the words "Replace Card" on the reverse of the said card indicate, and witness made reply that): "That indicates that at the time the accounts were opened the party opening the account was not present to sign the card and we put in what is known as a placer card and that card was replaced when the original signature card was returned."

Signature card introduced, marked DEFENDANT'S EXHIBIT A, and is as follows:

"Form 37 5M 1-32

"Below please find duly authorized signatures which you will recognize in the payment of funds or the transaction of other business for the account of.

FRANK P. WILSON, SPECIAL ACCOUNT.
50 Broadway, New York, N. Y.

WITH THE CALIFORNIA NATIONAL
BANK OF SACRAMENTO, CAL.

And the undersigned hereby agrees as follows:

[50]

In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit,

(Testimony of Darwin Arthur Sherwin.)

and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send its items, directly or indirectly, to any Bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

"All items are forwarded without instructions to protest if unpaid unless this Bank is otherwise instructed.

"Items need not be presented through the clearing house or forwarded to outside points until the business day following the day of deposit.

"The California National Bank is hereby authorized to forward monthly statement by ordinary mail to the address below, at the risk of the undersigned.

Signatures:

1................(Signed)....FRANK P. WILSON............

2 ....

3 ....

4 ....

Address—50 Broadway New York City, N. Y.

Date—Nov. 17, 1932"

Reverse side of signature card:

CO-DEPOSITOR CLAUSE

"TO THE CALIFORNIA NATIONAL BANK OF SACRAMENTO, CALIFORNIA:

"It is hereby declared by the Undersigned that

(Testimony of Darwin Arthur Sherwin.)
the funds now in this account or which may hereafter come into this account from any sources whatsoever are, and shall be, the property of the undersigned jointly and severally and are to be paid by THE CALIFORNIA NATIONAL BANK to us or to either of us in the absence of the other or to any other person or persons duly authorized by us or either of us to receive them or any portion of them and receipt therefor. In the event of the death of either of us, the funds shall be payable to the survivor, and in the event of the death of the survivor the funds shall be payable to the administrator, executor, heirs, assigns or legal successors of such survivor, and at all times, the funds in this account or any part thereof shall be paid by THE CALIFORNIA NATIONAL BANK to the person or persons so entitled to draw them regardless of the original ownership of the moneys so deposited. [51]

"In case of the death of either or both of us, further repayment shall at the option of THE CALIFORNIA NATIONAL BANK be conditioned upon the production of evidence that all inheritance and estate taxes—if any be due—have been paid, and that all other provisions of law in such cases made and provided have been fulfilled.

2 ....

1 ....

Date..

Opened with cash - - $........................
(1-30)
Opened with checks - $ 35,000.—
Total - - - - - $......................

(Testimony of Darwin Arthur Sherwin.)

Reverse side of signature card continued:

"Owner of building leased

Business—to W. T. Grant Co.

Introduced by—H. M. Weston

Opened by—D. A. S. (S. S. Ruttenberg)

Reference ....

Account secured by..............................

S. S. Ruttenberg is Supt. of Leases

Remarks—for W. T. Grant Co.

Placer

RELACEs / CARD

DATED 10-27-32

Date closed..

Date re-opened....................................

WITNESS IS SHOWN a deposit slip purporting to cover the account of Frank P. Wilson and which is marked DEFENDANT'S EXHIBIT B, and is as follows:

"Depositors are requested to Specify Banks upon which checks are Drawn

new

DEPOSITED BY

Frank P. Wilson

SPECIAL ACCOUNT

50 Broadway, New York

N. Y. [52]

(Testimony of Darwin Arthur Sherwin.)

WITH
THE CALIFORNIA NATIONAL BANK
of Sacramento
SACRAMENTO, CALIF., OCT. 27 1932

	DOLLARS	CENTS
Gold		
Silver		
Currency		
Checks		
1 - 30—	3 5 0 0 0 —	

: 106 :

"In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send its items, directly or indirectly to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

"All items are forwarded without instructions to

(Testimony of Darwin Arthur Sherwin.)

protest if unpaid unless this Bank is otherwise instructed.

"Items need not be presented through the Clearing House or forwarded to outside points until the business day following the day of deposit."

and WITNESS said, "I made out that deposit slip—I gave the depositor a book and I made that notation and it went through the routine of the bank; it went to the ledgers—this tag that has been referred to, that is the bank record and I placed the amount in the deposit book and initialed the deposit book.

It is customary to send the depositor's monthly statements—customary to send them to the address noted on the pass book. I had nothing to do with sending out statements." [53]

STIPULATED THAT MONTHLY STATEMENTS of his account were sent to and received by Mr. Wilson, and that the checks drawn by Mr. Wilson and paid by the bank were sent back to him with the monthly statements with the exception of checks that had been presented since the bank suspended.

WITNESS SHERWIN

recalled by Defendant testified:

Mr. Weston brought Mr. Ruttenberg over to my desk with a check for $35,000. I don't recall the exact conversation, but Mr. Ruttenberg explained

(Testimony of Darwin Arthur Sherwin.)

to me that he wanted to open a commercial account under the name of Frank P. Wilson, and we proceeded with the mechanics of opening the account. Nothing was said regarding the bank having a joint control or getting an architect's certificate before the payment of checks. That money shown by this deposit card went into the general funds of the bank.

CROSS EXAMINATION

I did not participate in any of the negotiations leading up to the agreement and extension of Mr. Wilson's loan. I did not know anything about the terms and conditions imposed upon Mr. and Mrs. Wilson relative to the extension of their loan. I knew nothing of that. My principal business was in handling the new accounts—that is, I handled the mechanical part of the opening of a new account. I do not remember the exact conversation which I had on October 27 with Mr. Ruttenberg or Mr. Weston, but I have seen the signature card since and I recall that a general conversation was had at that time regarding the opening of a special account. I do not recall the exact conversation except that Mr. Ruttenberg asked to have it put in a special account. I do not remember whether he asked for a special *ccount* or special deposit. I do not recall telling him that we did not have a stamp "Special Deposit". I do not recall hearing Mr. Ruttenberg say "Well, just as long as it is understood what the purpose of the deposit is, it

(Testimony of Darwin Arthur Sherwin.)

is all right." I did not know the purpose [54] of the deposit at the time the account was opened. I was not familiar with that.

REDIRECT EXAMINATION

I made out this deposit on the instructions from Mr. Ruttenberg, and I followed his instructions as he told me.

HENRY M. WESTON

recalled by defendant, testified as follows:

"The transaction of the opening of the account with The California National Bank of Sacramento was carried on between Mr. Ruttenberg and Mr. Sherwin. I did not hear the conversation between them. We have never received any architect's receipts or certificates concerning this account and there are none such in the records of the bank.

The California Trust and Savings Bank is a State Bank with a State Charter, and The California National Bank of Sacramento is a National Bank holding a National Charter. The California Trust and Savings Bank is known as a departmental bank. It has a trust department and an escrow department situated in the trust department. It has a savings department and also a commercial department. They are in the same building and on the same floor of that building. The trust department was on the second floor of the building. The California Trust and Savings

(Testimony of Henry M. Weston.)
does a banking business on one floor—the first floor of that building and the savings bank was on that floor, too. The California National Bank was on that same floor. Practically the entire National Bank's business was transacted on the west side of the building and the Trust and Savings bank on the east side. As you go into the building on your left there is a sign there "The California National Bank" on the counter, and on your right side it is "California Trust and Savings Bank". There was no partition between the banks. It was one big floor with cages running right around the room. There were three additional [55] floors on which there were trust departments, and other departments of the national bank also. The physical fittings of the bank were the same throughout. The California National Bank of Sacramento was a Commercial Bank.

The Trust Department employed about seven people and in that Trust Department we have facilities for handling escrows.

CROSS EXAMINATION

I did not personally, and I do not know of any one else who did, demand architect's certificates as a condition to honoring the checks on the deposit made by Mr. Wilson. Mr. A. B. Carter was the Cashier of both institutions, that is to say, his title would be Secretary of the California Trust and Savings Bank. He sat on the left side—The California National Bank's side. The officers of one

(Testimony of Henry M. Weston.)
bank were also the officers of the other institution, and all officers, except myself and assistant cashier, sat on the National Bank's side.

Defendant's EXHIBIT C was introduced—same consisted of bank statements of account for Nov., 1932 and Dec., 1932, respectively, each of which was headed:

"Statement
in account with
The California National Bank
Sacramento, Calif.

Frank P. Wilson
Special Account
50 Broadway
New York, N. Y.

—the November, 1932, statement showed deposit 11/27/32 $35,000 and payment of checks as follows: 11/28 $4,500; 11/29 $550; 11/30 $1,403.60 and balance of deposit 11/30 $28,546.40; the December, 1932, statement showed payment of checks as follows: 12/1, $782.07; 12/7, tax .06; 12/8, $843.30; 12/9, $550; 12/12, $820; 12/19, $54.50 and balance 12/19 $19,196.47—and it was STIPULATED that said statements had been sent by The California National Bank of Sacramento to plaintiff in due course of business. [56]

Defendants Exhibit D was introduced—and it was stipulated that same is a copy of the ledger

(Testimony of Henry M. Weston.)

sheet of the bank showing the state of this account: Said sheet is headed

"Name—Frank P. Wilson Special Account
Address—50 Broadway, New York, New York"

and shows deposit 10/27/32 $35,000. and payment of all checks enumerated in Exhibit C and in addition thereto the following; viz: 1/3/33. $187; 1/5/33 Tax .12; 1/7/33, $3,084.30; 1/7/33, $550.; 1/10/33, $1,102.50; 1/12/33 $842.85; 1/20/33 tax .10, and balance 1/20/33 $13,429.60.

EVIDENCE CLOSED. TO BE SUBMITTED ON BRIEFS

Submission:

Thereafter brief filed and cause submitted.

The above and foregoing statement of evidence is a true and correct statement of evidence heard at the trial of above entitled cause, and may be presented to, and approved by, the Judge without notice.

Dated: March 7, 1935.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

The foregoing Statement of Evidence is in all respects approved and same is settled as a true and complete statement of the evidence adduced on the trial of the above entitled cause, and same is hereby ordered to be filed herein as a Statement of Evi-

dence to be included in the record on appeal of above entitled cause, in conformity with equity rule 75 of the Supreme Court of the United States. [57]

And I further certify that those portions of said Statement of Evidence which purport to reproduce some of the testimony in the form of Question and Answer were so made at the request of plaintiff and by my direction.

Done in open court this 8th day of March, 1935.

A. F. ST. SURE

Judge of said Court—being the judge presiding at said trial.

[Endorsed]: Filed Mar 9 1935. [58]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable A. F. St. Sure, Judge of the District Court of the United States, for the Northern District of California, Northern Division:

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause on the 10th day of December, 1934 hereby appeals from said decree to the Circuit Court of Appeals of the United States, for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and prays that his appeal be

allowed and that a citation be issued as provided by law and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and your petitioner prays that a proper order touching the security required to effect his appeal be made.

HINSDALE, OTIS & JOHNSON

GERALD R. JOHNSON

Attorneys for the Defendant and Appellant

Copy received this 28th day of February, 1935.

DOWNEY, BRAND & SEYMOUR

Attorneys for Plaintiff.

[Endorsed]: Filed Feb 28 1935. [59]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Defendant, appellant, files and presents with his petition for allowance of appeal herein, the following as his assignment of errors on which he will rely in the prosecution of his appeal from the decree of the above entitled court made in the above entitled cause on December 10, 1934, viz:

I.

The court erred in overruling defendant's motion for a nonsuit—which said motion was made at the close of Plaintiff's case in chief and was made on

the grounds "that there never was any express agreement or implied agreement that the funds deposited would be kept separate and distinct from the general funds of The California National Bank of Sacramento, nor is the evidence sufficient to sustain a judgment, if the court should so find".

II.

The court erred in refusing defendant's request, made at the close of all the evidence and before any decision was announced or made, that the court find from the evidence that:

The deposit of funds mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. S. Ruttenberg) and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the [60] terms and conditions of an ordinary and general deposit in a commercial bank.

III.

The court erred in refusing defendant's request, made at the close of all the evidence and before any decision was announced or made, that the court find from the evidence that:

There never was any agreement or understanding between plaintiff and The California National Bank of Sacramento that the deposit of funds referred

to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said bank.

IV.

The court erred in refusing defendant's request, made at the close of all the evidence and before any decision was announced or made, that the court find from the evidence that:

At the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had become a part of, the general assets of said bank and subject to the check of said depositor as in the case of ordinary deposits in commercial banks.

V.

The court erred in refusing to hold (as requested by defendant at the close of the evidence and before any findings or decision were made or announced) that:

On the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought or to any relief, and the Bill of Complaint should be dismissed with costs.

VI.

The court erred in making that portion of Finding of [61] Fact No. VII which reads as follows:

"That the said sum of $35,000. was received and accepted by the California Trust and Savings Bank

upon the understanding, and said bank thereupon agreed with plaintiff that said amount was remitted by plaintiff as security only; that said remittance was not to be employed by said bank for its own purposes; and that the only and specific use to be made of said amount, and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the costs of said improvements and not otherwise."

VII.

The court erred in making that portion of Finding of Fact No. VIII which reads as follows:

"The California National Bank of Sacramento was fully cognizant of all the terms, conditions, covenants, and agreements of the parties in respect to said fund and its purposes and of all limitations in respect to its use and accepted said deposit upon said terms and each of them, and promised and agreed with plaintiff that said amount was transmitted by plaintiff and was received and accepted by said The California National Bank of Sacramento for the purpose of security only; that said fund was not to be employed by said The California National Bank of Sacramento for its own purposes; and that the only and specific use to be made of said fund and to the exclusion of all other uses, was the fulfillment of said guarantee by the application of said fund to the cost of said improvements and not otherwise. That by said agreement the parties intended to and did make and constitute The California National Bank of Sacramento

trustee of said fund and a trust in the amount of said deposit was created by the parties by the terms and provisions of said understanding, and under said trust the use of said fund was restricted to the specific uses stated herein." [62]

VIII.

The court erred in making that portion of Finding of Fact No. XI, which reads as follows:

"That included in the assets which came into defendant's hands, as such Receiver, was said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100th Dollars ($13,429.60) and said assets so coming into said defendant's hands were received by him subject to a trust therein in plaintiff's favor for the full unexpended balance of said sum of Thirty-five Thousand Dollars ($35,000.00), to-wit, Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) and said sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60) has in all respects been traced into the hands of defendant as such Receiver."

IX.

The court erred in refusing to make Findings of Fact No. 1 requested by defendant—which said requested finding was as follows:

That the deposit of fund mentioned in paragraph IX of the complaint herein and which is in controversy in this suit was made by plaintiff, Frank P. Wilson (by his agent S. S. Ruttenberg) with The

California National Bank of Sacramento and said deposit was not made by said plaintiff, and was not accepted by The California National Bank of Sacramento, under or in pursuance of any of the terms of any letter; and was not made or accepted on any terms or conditions save and except on the terms and conditions of an ordinary and general deposit in a commercial bank.

X.

The Court erred in refusing to make Finding of Fact No. 2 requested by defendant which said requested finding was as follows:

That there never was any agreement or understanding [63] between plaintiff and The California National Bank of Sacramento that the deposit of funds referred to in the complaint and involved in this cause, was to be held or kept separate from the general funds of said bank or was not to be used by said bank in the general and usual conduct of its business as a commercial bank.

XI.

The court erred in refusing to make Finding of Fact No. 3 requested by said defendant which said requested finding reads as follows:

That at the time of the suspension of The California National Bank of Sacramento the funds comprising the deposit involved in this suit had, with the knowledge and consent of the depositor (viz, the complainant), been mingled with, and had become

a part of, the general assets of said bank and subject to the check of said depositor as in the case of ordinary deposits in commercial banks.

XII.

The court erred in refusing to make Finding of Fact No. 4 requested by said defendant which said requested finding reads as follows:

That the said The California National Bank of Sacramento was a national bank and the California Trust and Savings Bank was a state bank and said two banks were entirely separate and distinct corporate entities, and as to the deposit in question in this suit said banks had no privity of contract or of interest with each other.

XIII.

The court erred in refusing to make Finding of Fact No. 5 requested by said defendant, which said requested finding reads as follows:

That said The California National Bank of Sacramento had no notice or knowledge of any agreement or understanding between plaintiff and the said California Trust and Savings Bank [64] that the deposit involved in this suit was a special deposit or was impressed with any trust whatsoever.

XIV.

The court erred in refusing to hold that on the whole case the law and the facts are with defendant and plaintiff is not entitled to the relief sought

or to any relief, and the Bill of Complaint should be dismissed with costs.

XV.

The court erred in holding in its decree that there be and is hereby impressed in plaintiff's favor upon the assets of The California National Bank of Sacramento, a corporation, coming into the hands of defendant H. W. Douglass as Receiver of said Bank, a trust, preference and priority in the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60).

XVI.

The court erred in holding in its decree that defendant holds the sum of Thirteen Thousand, Four Hundrd Twenty-nine and 60/100ths Dollars ($13,429.60) as trustee for plaintiff and that plaintiff is entitled to the payment of said sum forthwith.

XVII.

The court erred in holding in its decree that plaintiff do have and recover from defendant as Receiver of said The California National Bank of Sacramento, a corporation, the sum of Thirteen Thousand, Four Hundred Twenty-nine and 60/100ths Dollars ($13,429.60), together with his costs of court herein taxed in the sum of $59.47.

And for which errors said defendant prays that the judgment and decree of said court made and entered herein on [65] December 10, 1924, may be

reversed and for such other and further relief as to the court may seem just and proper.

Dated February 28th, 1935.

HINSDALE, OTIS & JOHNSON
GERALD R. JOHNSON
Attorneys for Defendant

Copy received this 28th day of February, 1935.
DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff.

[Endorsed]: Filed Feb 28 1935 [66]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

This matter coming on for consideration upon the petition of the defendant and appellant for an order permitting his appeal from the findings and decree entered by this court on the 10th day of December, 1934, finding in favor of the plaintiff and appellee and against the defendant and appellant, all as set forth in the petition for appeal and the assignments of error which have been filed herein and were presented to this court along with said petition for appeal;

Now, therefore, premises considered, it is Ordered that said appeal be allowed as prayed for in said petition; and, it appearing to the court by the testimony of defendant that he has been authorized and

directed by The Comptroller of The Currency to appeal from said Decree to the United States Circuit Court of Appeals for the Ninth Circuit, it is, in view of the provisions of Title 28 U. S. C. A. Section 870, FURTHER ORDERED that no bond be required to be given by appellant.

Done in open Court March 6, 1935.

A. F. ST. SURE
U. S. District Judge.

Copy received and service admitted this 7th day of March, 1935.

H. B. SEYMOUR
DOWNEY, BRAND & SEYMOUR
Attorneys for Defendant

[Endorsed]: Filed Mar 7 1935 [67]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court,

GREETING:

You will please prepare a transcript of the record in the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon the appeal heretofore perfected in said Court in the above entitled cause,

and include therein the following papers and records, to-wit:

Complaint

Answer

Statement of Evidence

Defendant's request for findings and holding by the Court—filed April 16, 1934.

Defendant's requested Findings—filed November 22, 1934.

Findings made by the Court

Order of Court announcing its decision—filed November 16, 1934.

Order of Court allowing exceptions to defendant

Decree

Petition for allowance of Appeal

Assignment of Errors

Order allowing Appeal

Citation (original)

Praecipe

Dated March 9, 1935.

HINSDALE, OTIS & JOHNSON
GERALD R. JOHNSON
Attorneys for Defendant

Copy received and service admitted this 9th day of March, 1935.

HARRY B. SEYMOUR
DOWNEY, BRAND & SEYMOUR
Attorneys for Plaintiff

[Endorsed]: Filed Mar 9 1935 [68]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 68 pages, numbered from 1 to 68 inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Frank P. Wilson, vs. H. W. Douglass, etc., No. 1163-S (Equity), as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Twenty-three and 60/100 ($23.60) and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of March, A.D. 1935.

[Seal] WALTER B. MALING

Clerk,

By F. M. LAMPERT

Deputy Clerk. [69]

[Title of Court and Cause.]

CITATION

The United States of America to Frank P. Wilson,

GREETING:

You are hereby notified that in a certain cause in Equity in the United States District Court for the Northern District of California, Northern Division, wherein you appear as plain- [70] tiff and H. W. Douglass, as Receiver of The California National Bank of Sacramento appears as defendant, an appeal has been allowed the defendant to the United States Circuit Court of Appeals, for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Court at San Francisco, California, thirty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 6th day of March, 1935.

A. F. ST. SURE

U. S. District Judge.

Service of the within citation admitted this 7th day of March, 1935.

H. B. SEYMOUR

DOWNEY, BRAND & SEYMOUR

Attorneys for the Plaintiff.

[Endorsed]: Filed Mar 7 1935 [71]

[Endorsed]: No. 7805. United States Circuit Court of Appeals for the Ninth Circuit. H. W. Douglass, as Receiver of the California National Bank of Sacramento, Appellant, vs. Frank P. Wilson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 20, 1935.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.